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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE RATH PACKING COMPANY CREDITORS' TRUST,
Successor in Interest to The Rath Packing Company,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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July 17, 1986

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QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously construe Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), when it applied the disparate impact analysis to the subjective hiring practices of Petitioner in a manner that squarely conflicts with decisions of other Circuit Courts of Appeals and with decisions of other panels of the Eighth Circuit (*see* Table 1 at pp. 9-12, *infra*)?

2. Did the Court of Appeals erroneously construe Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), and apply the wrong legal standard when it held that Petitioner's no-spouse rule was not justified by business necessity?

LIST OF PARTIES AND RULE 28.1 LIST

United Food and Commercial Workers, AFL-CIO (formerly Amalgamated Meatcutters and Butchers Workmen of North America, AFL-CIO), District Local 431 (hereinafter "Local 431") was the exclusive bargaining representative for plant employees at Petitioner's predecessor's Columbus Junction, Iowa plant. Local 431 was designated as a defendant in Respondent's complaint pursuant to Fed. R. Civ. P. 19(a)(2). The District Court granted Local 431's motion for partial summary judgment on the issue of Title VII liability, but ordered it to participate in the remedy phase of the action. (App. 1d-2d.) The District Court later dismissed the complaint as against Local 431. (App. 11b.) Local 431 did not participate in the proceedings before the Court of Appeals, though it was separately identified in the caption of the opinion. (App. 1a.) Neither issue addressed in this Petition pertains to Local 431 and, therefore, it is not named as a party herein. Counsel for Local 431 nevertheless will be served with this Petition.

Petitioner The Rath Packing Company Creditors' Trust has no parent company, subsidiaries or affiliates as contemplated by Supreme Court Rule 28.1. However, Petitioner is the successor in interest to The Rath Packing Company, an Iowa corporation which was reorganized under Chapter XI of the United States Bankruptcy Code during the appeal of this case. The Rath Packing Company Creditors' Trust was formed in December, 1985, was approved by the United States Bankruptcy Court for the Northern District of Iowa, No. 83-02293, and succeeded to the interests in the bulk of the debtor's (i.e., Rath Packing Company's) bankruptcy estate, including all liability for the judgment entered below. The reorganized

Rath Packing Company now operates as Black Hawk Holdings, Inc., a publicly-held Iowa corporation, which has one wholly-owned subsidiary, Liberty Capital Corp., also an Iowa corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner The Rath Packing Company Creditors' Trust respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned matter on March 20, 1986.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 787 F.2d 318, and is reprinted in the separately-bound Appendix to this Petition at page 1a. The relevant written decisions and rulings of the District Court, and a court-appointed special master, have not been reported. They are reprinted in the separately-bound Appendix to this Petition as follows: the February 10, 1984 District Court Ruling on Objections to Report and Recommendation of Special Master at page 1b; the September 30, 1983 Report and Recommendation of Special Master at page 1c; the April 22, 1981 Memorandum Opinion and Order of the District Court at page 1d.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Sections 451, 1343 and 1345, Respondent Equal Employment Opportunity Commission ("EEOC") on September 1, 1977 initiated this action against Petitioner's predecessor in interest, The Rath Packing Company ("Rath"), in the United States District Court for the Southern District of Iowa. On April 22, 1981, the District Court entered its Memorandum Opinion and Order granting EEOC partial summary judgment against Rath on the issue of liability under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a). (App. 1d.) The District Court referred the case to a special master under Fed. R. Civ. P. 53 for determination of the remedy or remedies and, on September 30, 1983, the Report and Recommendation of Special Master was filed. (App. 1c.)

On February 10, 1984, the District Court issued its Ruling on Objections to Report and Recommendation of Special Master and its final judgment. (App. 1b, 7b-11b.)

Rath appealed to the Eighth Circuit under 28 U.S.C. Section 1291 and Fed. R. App. P. 4(a)(1). EEOC cross-appealed. On March 20, 1986, the Eighth Circuit entered its judgment and an opinion affirming in part and reversing in part the District Court's judgment. (App. 1a.) No petition for rehearing was sought.

On June 17, 1986, Circuit Justice Harry A. Blackmun ordered the time for filing this Petition be extended to and including July 17, 1986. (Order, No. A-951.)

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The principal statutory provision involved is 42 U.S.C. Section 2000e-2(a), which provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Background

Petitioner's predecessor in interest, The Rath Packing Company (hereinafter "Rath"), was an Iowa corporation engaged in the business of slaughtering hogs and processing the meat products obtained therefrom. Rath had its principal plant in Waterloo, Iowa, and a slaughter and limited processing operation in Columbus Junction, Iowa, a town of approximately 1500 people. The Columbus Junction plant was the subject of this litigation and was divided into twelve departments: hog kill, hog cut, loading, sanitation, trim, inedible rendering, yards, smoking and curing, packing, casing, maintenance, and miscellaneous gang. This facility employed approximately 250 people, and more than half of the job classifications here during the nine-year employment period under scrutiny were in the kill and cut departments. (App. 3a.) The District Court found it "evident from the testimony that several of these positions were either less desirable to female employees or beyond the physical capabilities of some of them." (App. 13d.)

Rath had no established procedure for giving notice of job vacancies to the public. Rath's collective bargaining agreement required that where possible Rath would promote or transfer from within rather than hire from with-

out. (App. 4d.) As a result of the company's bidding procedure, every employee hired into a department might be required to perform any of the jobs in that department. Rath had no written or otherwise established employment selection guidelines. (App. 4a.)

From 1966 to July 1980, when trial of the liability issues took place, seven married couples were employed at the Columbus Junction plant. On August 1, 1973, a no-spouse rule was implemented prospectively by Rath to resolve problems arising from spousal employment. (App. 4a, 25d-26d.)

Stipulated statistics indicated that 554 individuals applied to Rath for employment during a five-year period beginning January 1, 1973. Seven of 95 female applicants who were not spouses of current employees were hired. Twenty-six female applicants were denied employment because they were spouses of current employees. (App. 3a.)

Proceedings Below

On September 1, 1977, the Equal Employment Opportunity Commission (hereinafter "EEOC") brought suit against Rath in the United States District Court for the Southern District of Iowa alleging Rath to be in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a). Specifically, EEOC charged that Rath effectively denied equal employment opportunities to females at the Columbus Junction plant through discriminatory hiring practices and the maintenance of its no-spouse rule. (App. 3d, 2c.)

The action was bifurcated and separate trials were conducted regarding Rath's Title VII liability (in July,

1980) and appropriate remedial measures (in April, 1983). On April 22, 1981, the District Court evaluated EEOC's claim under the "less stringent impact doctrine" (App. 6d) and held that Rath's subjective hiring practices were "not justified by business necessity." (App. 16d.) The District Court did conclude, however, that Rath had "sustained its burden of proving that the [no-spouse] rule was justified by business necessity." (App. 31d.) The District Court then referred the case to a special master for the investigation, hearing and report "relating to the appropriate remedy or remedies to be awarded herein." (App. 8c.) On February 10, 1984, following submission of the master's report and recommendation, the District Court entered final judgment against Rath imposing certain remedial measures, including a class-based backpay award in the amount of $1,000,000. (App. 10b.)

Rath appealed to the Eighth Circuit and EEOC cross-appealed. On March 20, 1986, the Court of Appeals issued its judgment and opinion affirming the District Court's backpay award. The Eighth Circuit held that Rath's subjective hiring practices were not justified by business necessity and found "[t]he undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women." (App. 17a.) However, the reviewing court reversed the trial court's no-spouse rule determination and held that the District Court had "applied the wrong legal standard in determining whether the no-spouse rule was justified by business necessity. The district court did not consider whether there was a compelling need for the no-spouse rule." (App. 25a.)

Petitioner requests that this Honorable Court review and reverse the decision of the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

I

DIRECT, IRRECONCILABLE AND INTOLERABLE DECISIONAL CONFLICTS BETWEEN AND WITHIN THE FEDERAL CIRCUITS PRESENTLY EXIST OVER WHETHER THE DISPARATE TREATMENT ANALYSIS OR THE DISPARATE IMPACT ANALYSIS SHOULD BE APPLIED TO A TITLE VII CLAIM AGAINST AN EMPLOYER'S SUBJECTIVE HIRING PRACTICES.

A. Intercircuit And Intracircuit Title VII Decisions Squarely Conflict Over The Application Of The Appropriate Legal Standard To Test Subjective Employment Practices.

The recent case law construing Section 703(a) of Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a), reveals a serious analytical conflict between and within the federal circuits regarding the appropriate standard of proof to be applied in challenges to employers' subjective employment practices. Some courts have applied the disparate treatment model, while others the disparate impact analysis. Schlei and Grossman concede "[t]here has been much confusion by the courts as to how to characterize" cases involving challenges to the employer's "total selection process," rather than a "specific employment practice." B. Schlei & P. Grossman, *Employment Discrimination Law* at 1288 (2d ed. 1983). The judicial scrutinization of subjective employment criteria is proving troublesome in comparison with courts' review of objective, facially neutral employment practices such as intelligence and aptitude tests, or minimum physical requirements—these latter

practices being susceptible to scrutiny under the less burdensome disparate impact proof standard announced in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971).

The choice as to which legal framework to apply under Section 703(a) is extremely significant not only to the outcome of a particular lawsuit, but also to the body of law our judicial system imposes on employers nationwide. "[T]he choice of theory can make a difference, since intent to discriminate need be proved only under the disparate treatment theory, not under the disparate impact theory." *EEOC v. Sears, Roebuck & Co.,* 628 F. Supp. 1264, 1279 (N.D. Ill. 1986).[1] Therefore, it is essential that our courts and marketplace intelligibly understand the true scope of Section 703(a) in the post *Griggs* era.

Confusion, however, aptly describes the federal case law haggling over the application of the disparate treatment and disparate impact constructs to employers' subjective employment practices. It is no exaggeration to charge that the federal circuits lie scattered across the landscape in their decisions on this question. Indeed, the circuits have created an irreconcilable and intolerable conflict—an impasse greatly compounded by numerous unquestionable and inexplicable *intracircuit* conflicts on this same point.

For brevity's sake, Petitioner has categorized and summarized the holdings of the various circuit courts of appeals which have squarely, albeit at times subtly, addressed the issue of the appropriate subjective hiring practices analysis:

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1. Judge Nordberg concisely analyzes the evolution of, and distinction between, these two theories as a preface to his scholarly memorandum opinion in this massive employment discrimination case. *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1279-1285.

TABLE 1

SUBJECTIVE HIRING PRACTICES ANAYLSES: CONFLICT AMONG THE CIRCUITS

Circuit	Disparate Treatment	Disparate Impact
D.C.		*Segar v. Smith*, 738 F.2d 1249, 1288 n.34 (D.C. Cir. 1984) ("Though these [employment] practices arguably encompass some subjective judgments as to [employees'] performance, we find that disparate impact appropriately applies to them.")
Fourth	*EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 638-39 (4th Cir. 1983), *rev'd on other grounds sub nom.*, 467 U.S. 867 (1984) (The disparate treatment analysis is applied to a "subjectively based [employment] practice" where there is no evidence of "an objective standard applied evenly and automatically to affected employees.")	
Fifth	*Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800-01 (5th Cir. 1982) ("[T]he failure to post job openings, the use of a level system, and evaluating employees with subjective criteria" are not "'facially neutral employment practices' the disparate impact model was designed to test.")	*Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1045-46 (5th Cir. 1984) ("In light of our recent decisions in *Pouncy* and

	Pegues v. Mississippi State Employment Service, 699 F.2d 760, 765 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1983) ("Because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied.")	*Pegues*, we conclude that" defendant's "subjective promotional system" may be examined under the disparate treatment *and* disparate impact models.)
ixth		*Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 93 n.10 (6th Cir. 1982) (Due to "some confusion as to which liability theory was applicable[,]" defendant's "subjective evaluation procedures" will be analyzed under *both* models "to insure a just result.")
eventh	*Coates v. Johnson & Johnson*, 756 F.2d 524, 530-31 n.4 (7th Cir. 1985) (The disparate impact theory is inappropriate where plaintiff "never argued that there were facially neutral termination rules that had a disproportionate impact on blacks.")	*Stewart v. General Motors Corp.*, 542 F.2d 445, 450-51 (7th Cir. 1976), *cert. denied*, 433 U.S. 919, *reh. denied*, 434 U.S. 881 (1977) (An employer's "highly subjective and loosely structured" promotional practices are analyzed under the disparate impact theory.) *Regner v. City of Chicago*, 789 F.2d 534, 539 (7th Cir. 1986) ("We find the . . . [disparate impact] analysis appropriate for claims [against "somewhat subjective criteria"] considered

		at the early stages of the trial process.")
Eighth	*Taylor v. Teletype Corp.*, 648 F.2d 1129, 1132-33 n.6 (8th Cir. 1981) (Plaintiffs' claims could only be examined under discriminatory treatment where "they allege improper use of subjective procedures for demotions.") *Harris v. Ford Motor Company*, 651 F.2d 609, 611 (8th Cir. 1981) ("A subjective decision-making system, however, is not the type of practice outlawed under *Griggs* and cannot alone form the foundation for a discriminatory impact case.") *Talley v. U.S. Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (The impact analysis is "inappropriate" where plaintiff "broadly attacks [the employer's] system of subjective decision-making rather than pointing to a facially neutral employment practice that operates in a discriminatory manner.")	*Gilbert v. City of Little Rock*, 722 F.2d 1390, 1397-98 (8th Cir. 1983) (The disparate impact model is applied to an attack on "the oral interview, the chief's rating" and other decisions made by the defendant police department "on the basis of largely subjective criteria.") **EEOC v. Rath Packing Company, 787 F.2d 318, 328 (8th Cir. 1986) ("The undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women.")**
	Heagney v. University of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981) (Plaintiff is required to prove disparate	*Hung Ping Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982) (An employer's subjective employment criteria is

inth	treatment where she attacks her employer's subjective salary decisions.)	examined under the impact construct and plaintiff "need only demonstrate the lack of objective criteria and a disparity in job promotions.")
enth	*Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982) (Plaintiff could not assert a disparate impact claim because "she has not pointed to any employment practice that, neutral on its face, has caused women not to be promoted. . . .")	*Bauer v. Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981) ("Subjective hiring and promotion decisions" are considered under the disparate treatment *and* disparate impact principles.)
leventh		*Griffin v. Carlin*, 755 F.2d 1516, 1522-25 (11th Cir. 1985) (The disparate impact analysis should apply to "the cumulative effect of employment practices [and] subjective decision-making.")

The confusion is perhaps best dramatized by the intercircuit and intracircuit analytical conflicts raging between and within the Fifth, Seventh, Eighth, Ninth and Tenth Circuits, where, in certain instances, Supreme Court principles have been ignored and prior circuit precedent has been neither followed nor distinguished. In *Page v. U.S. Industries, Inc., supra,* one Fifth Circuit panel expressly acknowledged two other panels' restriction of the disparate impact theory to attacks on facially neutral employment practices, *see Pouncy, supra,* and *Pegues, supra,* yet, without elaboration, concluded that "either theory may be applied to" the plaintiffs' challenge to the employer's "subjective promotional system."[2] 726 F.2d at 1045-46.

A recent Ninth Circuit panel yielded the truism that "there is some question as to whether [the impact model] may be applied at all to subjective employment decision-making." *Moore v. Hughes Helicopters, Inc.,* 708 F.2d 475, 481 (9th Cir. 1983). The *Moore* court noted "[t]he law in this court is unsettled" and cited the Circuit's holdings in *Heagney v. University of Washington, supra,* and *Hung Ping Wang, supra. Id.* The former decision precluded the disparate impact model's use in a challenge to subjective salary decisions while the latter, with no mention of the prior limiting precedent, authorized the impact construct in an attack on subjective employment criteria. The contrivance inherent in the *Hung Ping Wang* majority's holding was not missed by the dissent. *See Hung Ping Wang, supra,* 694 F.2d at 1149 (McNichols, J., dissenting) ("Application of [the disparate impact] analysis . . . is not likely to enhance stability in an area of law already fraught with uncertainty.")

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2. In reviewing decisions of the former and current Fifth Circuit, a panel of the Eleventh Circuit, in *Griffin v. Carlin, supra,* renounced the *Pouncy* analysis and followed *Page.* 755 F.2d at 1524 n.6.

Although a Seventh Circuit panel very recently conceded that "[r]aising a disparate impact claim is more problematic when subjective factors are present in the decisionmaking process," *Regner v. City of Chicago, supra,* 789 F.2d at 539, it nevertheless found the disparate impact theory "appropriate for claims considered at the early stages of the trial process." *Id.* at 539. The intent of the court's reduction of the analytical framework within stages of litigation is unclear. What is clear is that the *Regner* panel (a) relied on the Eleventh Circuit's *Griffin v. Carlin, supra,* and the Tenth Circuit's *Bauer v. Bailar, supra;* (b) distinguished the Fifth Circuit's *Pegues, supra,* and the Eighth Circuit's *Harris v. Ford Motor Company, supra;* and (c) completely ignored a year-old Seventh Circuit decision in *Coates v. Johnson & Johnson, supra,* which held the disparate impact model to be "inappropriate" where a plaintiff had failed to mount a claim against "facially neutral termination rules that had a disproportionate impact" on an affected minority. 756 F.2d at 530-31 n.4. Ironically, three months prior to the decision in *Regner,* a Seventh Circuit trial court followed *Coates, supra,* and held that the disparate impact theory "should be applied only" when a facially neutral policy "has been identified by the plaintiff." *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1285.

The Eighth Circuit is likewise befuddled. In *Taylor v. Teletype Corp., supra,* one panel permitted an attack on "subjective procedures for demotions" only under the disparate treatment theory. 648 F.2d at 1132-33. Another panel quickly followed suit in *Harris v. Ford Motor Company, supra,* 651 F.2d at 611 (*citing Taylor*). Two years later another panel followed *Harris* in *Talley v. U.S. Postal Service, supra,* 720 F.2d at 507. Suddenly, less than three weeks after the *Talley* decision was handed down, still

another Eighth Circuit panel, in *Gilbert v. City of Little Rock, supra,* applied the disparate impact model to an employer's "largely subjective criteria." 722 F.2d at 1397-98. No mention was made of *Talley,* or *Harris,* or *Taylor.* Of course, the Eighth Circuit's decision below in the case *sub judice* does not cite or distinguish *any* of these cases in support of its application of the disparate impact analysis to Rath's subjective practices.[3]

These decisions underscore the critical uncertainty in this weighty area of employment discrimination law. *See Rowe v. Cleveland Pneumatic Co., supra,* 690 F.2d at 92 ("The record reveals that there was some confusion on the part of the trial court and the parties as to whether [plaintiff's] claims were to be analyzed under the disparate treatment test . . . the disparate impact test . . . or under both."). No common thread of analysis can be gleaned from the conflicting case law—even among courts and holdings that come to the same conclusion. Application of the disparate impact theory to subjective employment criteria is shouted by some and whispered by others. Nor can it be said that "it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals" or that "the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. . . ." Justice Harlen, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 Austl. L.J. 108, 122 (1959).

Should the uncertainty in this important area of the law persist? Should Title VII litigants in one area of the country be accorded varying rights and obligations com-

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3. Other opinions are similarly vacuous in recognizing other circuit or prior intracircuit precedent. *E.g., Segar v. Smith, supra* (D.C. Circuit); *Bauer v. Bailar, supra* (Tenth Circuit); *Mortensen v. Callaway, supra* (Tenth Circuit).

pared to similar litigants in other areas of the country? Should Title VII litigants before one panel of a circuit be accorded rights and obligations different than those of litigants before another panel of that same circuit court of appeals?

Because of the importance of the federal question presented here, the need for uniformity in the construction and application of a far-reaching federal statute, and the lack of any clear Supreme Court directive on point with this issue, this Court should grant the writ prayed for herein, review the decision below, and instruct the Circuits. Sup. Ct. R. 17(a). *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Aldinger v. Howard*, 427 U.S. 1, 3 (1976); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).

B. In Applying The Disparate Impact Model To Rath's Subjective Hiring Practices, The Decision Below Departs From Established Supreme Court Precedent.

Rather than analyze Rath's subjective hiring practices under the disparate treatment standard of proof, the District Court observed that "[s]ubjective employment criteria and hiring policies are evidence of discrimination only where buttressed by proof that their use results in a disparate effect on the protected group." (App. 6d.) The court casually concluded[4] that "[e]ither form of analysis may be applied to the specific facts of this cause." (App. 6d.) The Eighth Circuit perpetuated this error when it

4. In arriving at this conclusion, the trial court relied on *Kirby v. Colony Furniture Co., Inc.*, 613 F.2d 699 (8th Cir. 1980). The Eighth Circuit, in *Kirby*, applied the impact construct to an employer's "leadman classification," which was attacked "as a facially neutral employment practice." 613 F.2d at 704. Subjective hiring practices were not before the *Kirby* court.

held that the "undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women." (App. 17a.) As discussed above,[5] the Eighth Circuit cited no authority for this holding, nor did it attempt to distinguish the disparate treatment holdings in *Taylor v. Teletype Corp., supra; Harris v. Ford Motor Company, supra;* or *Talley v. U.S. Postal Service, supra.*

In its decision here, the Eighth Circuit departs from the principles enunciated by this Court in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), and expounded in decisions hence. "In all of its decisions under the disparate impact theory, the Supreme Court has applied the theory only to specific facially neutral employment policies, and has implicitly indicated that the theory should be applied only to specific neutral policies." *EEOC v. Sears, Roebuck & Co., supra,* 628 F. Supp. at 1282. "The [Supreme] Court has applied the [impact] theory only in these circumstances, and has never stated or suggested that the theory should be applied in other circumstances." *Id.* at 1283. Indeed, this Court's consistent construction of Section 703(a) on this point has provided no basis "for applying the disparate impact theory to cases where the employer merely uses a 'subjective' hiring system, as most employers do." *Id.*

In *Griggs, supra,* this Court construed Title VII to prohibit "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" where such operated to "'freeze' the status quo of prior discriminatory practices." 401 U.S. at 430. The *Griggs* Court formulated the disparate, or adverse, impact standard of proof demanding employers show that "any given requirement . . . have a

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5. *See* p. 15, *supra.*

manifest relationship to the employment in question." *Id.* at 432. The employment requirements under consideration were "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capacity." *Id.*

Decisions since *Griggs* reaffirm the disparate impact model's limited application to attacks on objective, facially neutral employment practices and policies. *E.g., Connecticut v. Teal,* 457 U.S. 440, 448 (1982) (aptitude tests); *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) ("facially neutral standards"); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977) ("employment practices . . . facially neutral in their treatment of different groups"); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 436 (1975) (employer required to establish "job relatedness of its testing program"). Disparate impact then is defined only in terms of facially neutral policies, and the Eighth Circuit's decision is in conflict with this Court's precedents. Sup. Ct. R. 17(c). *See Army & Air Force Exchange Service v. Sheehan,* 456 U.S. 728, 733 (1982).

Rath's subjective hiring practices should have been examined under the disparate treatment model only.[6] *See*

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6. Respondent may argue that the District Court found Rath guilty of intentional discrimination and, therefore, Rath would be liable under Title VII for the backpay award in any event. However, the District Court's findings of intentional discrimination were limited to three women who were not members of the backpay award class. (App. 18d-23d.) The District Court questioned whether these "non-party" individuals could be entitled to relief and ordered the parties to brief this issue. (App. 31d-32d.) Mysteriously, no other mention of these individuals, or the intentional discrimination, is made in the record, other than a summary statement by the Eighth Circuit in its no-spouse rule holding. (App. 28a-29a.) Certainly, no inten-

(Continued on following page)

McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973). Under this standard, Rath's subjective hiring practices should be examined under a scrutiny that recognizes that an employer should not be compelled to adopt what a court perceives to be the best hiring criteria and procedures in lieu of those which the business has developed based upon its experience. *See Furnco Construction Corp. v. Waters,* 438 U.S. 567, 578 (1978). The record below supports the reasonableness of Rath's hiring practices vis-a-vis men and women desirous of accepting employment in the demanding and distasteful cut and kill aspects of its Columbus Junction hog slaughtering plant. (App. 13d.)

II

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD WHEN IT HELD THAT PETITIONER'S NO-SPOUSE RULE WAS NOT JUSTIFIED BY BUSINESS NECESSITY.

The District Court "approved and expressly authorized" Rath's no-spouse rule. (App. 8b, 31d.) "Upon review of the totality of the circumstances and proof thereof," the District Court was persuaded that the no-spouse

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Footnote continued—

tional discrimination finding exists to support the $1,000,000 backpay award to the class.

More importantly, the District Court examined "the instances of [alleged] individual discrimination" to determine whether EEOC "ha[d] buttressed by proof that [Rath's use of subjective employment criteria and hiring policies] result[ed] in a disparate effect on the protected group." (App. 6d) Clearly, the trial court's review of the allegations of individual discrimination was tainted by its erroneous application of the disparate impact standard. Rath's employment practices were "assessed in the aggregate" (App. 6d), and the intentional discrimination charges were not realistically scrutinized under a separate and true disparate treatment standard.

policy was enacted "to achieve the interrelated business objectives of optimum production and employee performance." (App. 26d.) After reviewing the evidence justifying the rule, and noting the crucial element of employee morale, the trial court summarized its scope of review:

> The issue the Court must address herein is not whether the heretofore described difficulties stemming from spousal employment were so egregious as to warrant imposition of the anti-spouse policy, but whether management's response to perceived production problems attendant upon the interjection of the marital relationship into the work place was reasonable under the existing circumstances, and designed to improve conditions in the plant. While [Rath] was unable to statistically corroborate its contention that production was adversely affected through the hiring of spouses, the Court is nonetheless of the opinion that the reasons articulated by Rath for promulgation of the rule are substantiated by the evidence.

(App. 29d.)

The Eighth Circuit reversed; it held that the lower court had not applied a strict enough standard in determining the rule's justification—that it failed to consider whether there was a "compelling need" for the rule. (App. 25a.) The Court of Appeals reasoned:

> The district court, however, did not require Rath to demonstrate how staff morale affected the safety or efficiency of Rath's operation. Staff discontent and reduced staff morale as a result of the scheduling of spouses' vacations may not be the basis for the no-spouse rule unless these problems affect the safety and efficiency of Rath's operation.

* * *

> In summary, we hold that Rath failed to establish a business necessity for the no-spouse rule. Rath failed to show that the problems that Rath experienced in employing spouses had any demonstrable effect on safety and efficiency. Workers' morale, which Rath and the district court deemed crucial to the business necessity analysis, cannot justify implementing a discriminatory policy where the claimed dissatisfaction has not been shown to have resulted in reduced productivity, decreased job efficiency, or more dangerous working conditions.

(App. 27a & 28a.)

In so holding, the Eighth Circuit chose to second-guess the trial court—and the business experiences of Rath. The court's failure to link workers' morale with productivity and efficiency is obvious from its analysis. The Eighth Circuit imposed on Rath the burden of proving the existence of an employment problem already recognized in management textbooks. Indeed, the court placed Rath in a Catch-22: Rath was required to prove the seriousness of an employment problem that, as a result of management's implementation of a "widely utilized and accepted" remedial measure (App. 29d), was quickly controlled.

In dwelling on the "minimal dual spouse absenteeism" from 1975 through 1978 (App. 26a), the court failed to realize that adverse effects on production, and absenteeism itself, were kept "minimal" in large part due to the no-spouse rule. Can Title VII be extended so far as to sanction appellate courts' speculative niggling over the effects of employee morale on a business?

The Eighth Circuit applied a much too stringent business necessity test in evaluating Rath's no-spouse rule,

a standard that conflicts with the more reasonable standard applied by the Seventh Circuit in *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). In *Yuhas*, the court accepted the common sense assumption "that it is generally a bad idea to have both parties in a marriage working together." 562 F.2d at 499. After reviewing various scenarios illustrating potential employment problems, the Seventh Circuit opined:

> It would be hard to prove that any of these reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous.

Id. The *Yuhas* court concluded that the employer's no-spouse rule was "job-related" and did not run afoul of Title VII. *Id.* at 500. *See Miller v. C.A. Muer Corp.*, 420 Mich. 355, 362 N.W.2d 650, 653, 653 n.6 (1984) ("The validity of antinepotism and no-spouse policies has been consistently sustained when challenged under Title VII . . . ."). *See also Espinoza v. Thoma*, 580 F.2d 346, 348-49 (8th Cir. 1978).

The Eighth Circuit's unduly restrictive business necessity standard also conflicts with Title VII principles laid down in *Griggs v. Duke Power Company, supra.* *See* Sup. Ct. R. 17(a). As the *Yuhas* court sensed, one must examine the no-spouse rule in light of the "animating spirit" behind *Griggs*. 562 F.2d at 499. Rath's no-spouse rule did not operate as a "built-in headwind," *see Griggs, supra*, 401 U.S. at 432, for female applicants at the Columbus Junction plant because it did not require that females

develop certain personal characteristics as a consequence of their environmental or genetic backgrounds. As in *Yuhas,* the discriminatory impact was the result of historical employment trends.[7]

The Court of Appeals' onerous business necessity standard is erroneous and requires that this Court accept review of this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Honorable Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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July 17, 1986

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7. For the reasons already noted, *see* footnote 6, *supra* at pp. 18-19, Respondent cannot rely on the District Court's limited findings of intentional discrimination as support for distinguishing *Yuhas.* Had the District Court believed such findings to be on the level of the *Yuhas* caveat, *see* 562 F.2d at 500 ("[t]his would be a different case if plaintiffs had shown that defendant . . . intentionally discriminated against women"), it would have distinguished rather than adopted the *Yuhas* analysis. (App. 25d, 31d.)

86-67

No.

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE RATH PACKING COMPANY CREDITORS' TRUST,
Successor in Interest to The Rath Packing Company,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 84-1217, 84-1458 and 85-1502

Equal Employment Opportunity Commission, Appellee,	)	
v.	)	Appeals from the
The Rath Packing Company, Appellants.	)	United States District Court
District Local 431 Amalgamated Meatcutters and Butcher Workman of North America, AFL-CIO	)	for the Southern District of Iowa

Submitted: October 9, 1984

Re-Submitted: April 22, 1985

Filed: March 20, 1986

Before LAY, Chief Judge, ROSS and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge

Rath Packing Company (Rath) appeals and the Equal Employment Opportunity Commission (EEOC) cross-appeals from a final judgment entered in the District Court for the Southern District of Iowa in an action brought pursuant to 42 U.S.C. § 2000e (1982) (Title VII). The district

court found that Rath's subjective hiring practices resulted in discrimination against women and were not justified by business necessity. The district court upheld Rath's no-spouse rule as justified by business necessity. The district court awarded backpay, post-judgment interest and affirmative injunctive relief. *EEOC v. Rath Packing Co.*, No. 77-57-D, slip op. at 7 (S.D. Iowa Feb. 10, 1984).

For reversal Rath argues that (1) the action should have been automatically stayed under 11 U.S.C. § 362(a) of the Bankruptcy Act, (2) the district court abused its discretion in denying a stay under 11 U.S.C. § 105 and 28 U.S.C. § 1651, (3) the district court's judgment violated 11 U.S.C. §§ 362(b)(5), 502(b) and 1129 because the judgment enforces a money judgment and imposes post-judgment interest, (4) the district court erred in finding a lack of business necessity for Rath's hiring practices, and (5) the district court abused its discretion in awarding backpay in light of Rath's precarious financial condition. Rath also appeals a final order entered on March 14, 1985, denying Rath's Fed. R. Civ. P. 60(b) motion.

EEOC on cross-appeal argues that the district court erred (1) as a matter of law and fact in concluding that Rath's no-spouse rule was justified by business necessity, (2) in denying retroactive seniority, prejudgment interest, and full costs to EEOC, and (3) in not calculating the class backpay award on the basis of the availability of female workers in the general population of Louisa County, Iowa.

For the reasons discussed below, we affirm in part, reverse in part and remand this case for further proceedings consistent with this opinion.

Rath, an Iowa corporation, is engaged in the business of slaughtering hogs and processing the meat products ob-

tained from the hogs. Rath has its principal plant in Waterloo, Iowa, and a limited operation in Columbus Junction, Iowa. The Columbus Junction plant, the subject of this litigation, is divided into 12 departments: hog kill, hog cut, loading, sanitation, trim, inedible rendering, yards, smoking, curing, packing, maintenance and miscellaneous gang. More than half of the job classifications at the Columbus Junction plant for the period from September 1, 1970, to August 31, 1979, were in the kill and cut departments. These jobs were considered the least desirable jobs in the plant but were the highest paid.

Rath's Columbus Junction facility employed approximately 250 persons; 50% of the employees were related to one another and 95% were male. The population of Columbus Junction is approximately 1500 persons.

Stipulated statistics established that 554 persons applied to Rath for employment from January 1, 1973, to February 15, 1978. During this period seven (or 7.39%) of the 95 female applicants (who were not spouses of current employees) were hired. Twenty-six additional female applicants were denied employment because they were spouses of current employees. Information concerning applications filed after February 15, 1978, is not available.

The United Food and Commercial Workers,[1] AFL-CIO (formerly Amalgamated Meatcutters and Butchers Workmen of North America), District Local No. 431 (Union), was the exclusive bargaining representative for plant em-

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1. The Amalgamated Meat Cutters and Butchers Workmen of North America, District Local 431, AFL-CIO, was designated as a defendant in the complaint pursuant to Fed. R. Civ. P. 19(a)(2). The district court on September 12, 1979, granted the Union's motion for a partial summary judgment on the issue of liability. The Union was required to participate in a subsequent hearing on relief.

ployees at the Columbus Junction plant. The collective bargaining agreements governing the plant required that where possible Rath would promote or transfer from within rather than hire from without. When a vacancy occurred, the vacancy was posted so that employees in that department could bid. If there were no bids, persons in other departments could bid. If no one in another department bid, then the employee with the least seniority in the department where the vacancy occurred was "forced to" the job. If there was no employee to "force to" the job, then a new employee was hired. Rath had no established procedure for giving notice of vacancies to the public.

Rath's office manager, Walter McFarland, was responsible for accepting and maintaining applications and selecting applicants for employment. The plant superintendent had the authority to overrule McFarland's choice of applicants but seldom did so. Rath had no written or otherwise established selection guidelines and McFarland was unable to identify what information was deemed significant in evaluating and selecting applicants. McFarland expressly discounted age, height, weight, prior experience, and work history as being critical in the selection of new employees. McFarland, however, stressed the importance of getting the right person for the job because the person could be assigned to any job in the plant.

In August 1973 Rath prospectively implemented a no-spouse rule prohibiting the employment of spouses of Rath employees. From approximately 1966 to the time of trial, Rath employed seven married couples at the Columbus Junction plant.

EEOC filed this suit in September 1977. The suit was based on a charge filed on December 15, 1975, by

Mary Turner, who alleged that Rath unlawfully refused to employ her because of her sex. EEOC alleged in its complaint that Rath refused to hire women at its Columbus Junction plant and that Rath's policy of not hiring spouses of employees excluded a disproportionate number of women from employment. EEOC sought injunctive relief, full backpay with interest, and costs.

The action was bifurcated and separate trials on liability and relief were held. After a four day trial in July 1980 on liability, the district court found that Rath discriminated against women in hiring from 1971 forward and that three women who testified at trial established individual claims of disparate treatment. The district court concluded, however, that Rath had shown a business necessity for the no-spouse rule.

The case was referred to a special master in 1982 for relief proceedings. In January 1983 Rath closed its Columbus Junction plant.[2] In April of 1983 the trial on relief was held. The special master recommended a class backpay award of $1,015,901, injunctive relief, and retroactive seniority for rejected female applicants. The special master further recommended that prejudgment interest not be granted. No recommendation was made concerning costs because one item of costs was compensation for the services of the special master.

After the special master issued his report and recommendations, Rath filed a petition in the bankruptcy court for reorganization under Chapter 11 of the Bankruptcy Act. The district court held that Rath's bankruptcy petition did not automatically stay the Title VII proceedings,

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2. The Columbus Junction plant was closed in June 1978, reopened in September 1979, closed again in January 1983, reopened in July 1984, and closed in October 1984.

In re Rath Packing Co., 37 Bankr. 614, 616-17 (S.D. Iowa 1984), and accordingly proceeded to consider the special master's recommendations and to enter final judgment.

The district court adopted the special master's recommendations to grant injunctive relief and to deny prejudgment interest. The district court awarded class-based backpay ($1,000,000) and post-judgment interest but denied retroactive seniority. The district court ordered that costs be shared equally between EEOC and Rath.

Rath and EEOC subsequently appealed the judgment of the district court. On October 9, 1984, the appeal was argued before this court. In February 1985 Rath filed a Rule 60(b) motion and requested that its appeal before this court be held in abeyance pending a decision on the motion. On February 22, 1985, this court ordered the district court to certify its ruling on the Rule 60(b) motion and ordered that the appeal be held in abeyance. On March 14, 1985, the district court denied Rath's 60(b) motion. On April 22, 1985, the order holding the appeals in abeyance was vacated, and the appeal from the denial of the 60(b) motion was consolidated with the pending appeals.

Automatic Stay Under 11 U.S.C. § 362(a)

Rath argues that the district court erred in refusing to stay those portions of the Title VII proceedings related to backpay, seniority, and interest because § 362(a) provides for an automatic stay of such proceedings. In support of its position, Rath argues that the automatic stay is one of the fundamental debtor protections provided by the Bankruptcy Act and is inapplicable only where a governmental unit sues to protect the public safety and health. Relying on *Missouri v. Bankruptcy Court*, 647

F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982), Rath argues that an action brought by EEOC, although a regulatory agency, is stayed by the automatic stay provision because it is primarily directed to making aggrieved persons financially whole.

EEOC argues that this action comes within the exception to the automatic stay provision because it is a Title VII action brought to enforce federal laws prohibiting discrimination in the work place. EEOC argues that suits under Title VII are guided by "an overriding public interest in equal employment opportunity asserted through direct federal enforcement." *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980) (citations omitted).

Section 362(a)[3] provides that filing a bankruptcy petition operates as an automatic stay of judicial proceedings

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3. 11 U.S.C. § 362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(Continued on following page)

against the debtor. "The general policy behind this section is to grant complete, immediate, albeit temporary relief to the debtor from creditors, and also to prevent dissipation of the debtor's assets before orderly distribution to creditors can be effected." *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 271 (3d Cir. 1984) (*Penn Terra*). However, actions by a government unit to enforce its police or regulatory powers are exempt from operation of the automatic stay provision under § 362(b)(4).[4] Thus,

> where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damage for violation of such laws, the action or proceeding is not stayed under the automatic stay.

S.Rep. No. 989, 95th Cong., 2nd Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838; H. Rep. No. 595, 95th Cong., 2nd Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6299.

Footnote continued—

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

4. 11 U.S.C. § 362(b)(4) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

. . . .

(4) under subsection (a)(1) of this section of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . .

No court has considered whether a suit by EEOC comes within the exception to the automatic stay. Courts have, however, considered whether actions brought by other types of regulatory agencies come within the automatic stay. The Sixth Circuit held that workers' compensation proceedings were not automatically stayed where the benefits were to be paid from an insurance fund or from security bonds which were not part of the debtor's estate. *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108, 1115 (6th Cir. 1981). Proceedings brought under the Fair Labor Standards Act for the assessment of penalties for violation of child labor laws likewise were not stayed by the automatic stay provision. *In re Tauscher*, 7 Bankr. 918, 920 (Bankr. E.D. Wis. 1981). The Third Circuit has also held that an action seeking a preliminary injunction to correct violations of the state environmental protection statute was not stayed by the automatic stay provision. *Penn Terra*, 733 F.2d at 274. Lastly, NLRB proceedings, which are closely analogous to EEOC proceedings, have not been stayed by the automatic stay provision. *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (per curiam); *In re Bel Air Chateau Hospitals, Inc.*, 611 F.2d 1248, 1250-51 (9th Cir. 1979). *Contra In re The Theobald Industries, Inc.*, 16 Bankr. 537, 537 (Bankr. D.N.J. 1981).

Rath, relying on this court's decision in *Missouri v. Bankruptcy Court*, 647 F.2d at 776, argues that under the reasoning of this case the EEOC proceeding should have been automatically stayed. We disagree. In *Missouri v. Bankruptcy Court*, a state regulatory agency attempted in state court to enforce Missouri's grain laws, which enforcement was in direct conflict with the bankruptcy court's orders. This court rejected the state's contention

that the police power exception automatically applied because a state agency was involved. Instead we analyzed the purpose underlying the Missouri law and found that although the law might be "regulatory in nature, [it] primarily relate[s] to the protection of pecuniary interest in the debtors' property and not to matters of public safety and health." *Id.*

By contrast, "EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes." *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 368 (1977). Thus, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone Co. v. EEOC,* 446 U.S. at 326. When EEOC sues to enforce Title VII it seeks to stop a harm to the public—invidious employment discrimination which is as detrimental to the welfare of the country as violations of environmental protection and consumer safety laws, which are expressly exempt from the automatic stay. We therefore hold that the automatic stay provision did not apply to this Title VII action brought by EEOC.

Denial of a Discretionary Stay

Rath next argues that the district court abused its discretion in refusing to grant a discretionary stay based on 11 U.S.C. § 105 and 28 U.S.C. § 1651. Rath argues that its assets were diminished by the litigation expenses and therefore a discretionary stay should have been granted. Further, Rath argues that the Columbus Junction plant closed during the pendency of the litigation

and no decision had been made at the time of the trial whether it would reopen. Thus, Rath argues the injunctive relief sought was meaningless.

EEOC argues that the district court properly denied the discretionary stay because litigation fees do not threaten the estate of the bankrupt. Litigation fees, like other debts incurred by a bankrupt before its reorganization plan is filed or approved, are ultimately settled by the bankruptcy court. EEOC argues that Congress by providing for the exception to the automatic stay implicitly recognized that preservation of the estate of the debtor is not always the primary goal.

Section 105[5] gives the bankruptcy court the power to issue orders necessary or appropriate to carry out the provisions of Title 11. The All Writs Act, 28 U.S.C. § 1651,[6] authorizes bankruptcy courts to issue stays. "Stays or injunctions issued under these sections will not be automatic upon the commencement of a case, but will be granted or issued under the usual rules governing the issuance of injunctions." *In re Vantage Petroleum Corp.*, 25 Bankr. 471, 476 (Bankr. E.D.N.Y. 1982). "[S]tays will be granted only if a party shows a necessity for a stay." *In re Bel Air Chateau Hospitals, Inc.*, 611 F.2d at 1251; *see In re Matter of Shippers Interstate Service, Inc.*, 618 F.2d 9, 13 (7th Cir. 1980). These stays by definition are discretionary and this court will overturn the decision of the lower court only if there has been an abuse of discretion.

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5. 11 U.S.C. § 105(a) provides: "(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

6. 28 U.S.C. § 1651(a) provides: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

We hold that the district court did not abuse its discretion in denying the request for a stay of the EEOC action. Congress by excepting certain actions from the automatic stay provision recognized that the debtor would likely incur litigation expenses as a result of any excepted lawsuit. *Penn Terra*, 733 F.2d at 278. Congress has therefore implicitly recognized that litigation expenses alone do not justify a stay of a proceeding. *See In re Rath Packing Co.*, 38 Bankr. 552, 562-63 (Bankr. N.D. Iowa 1984) (stay of NLRB proceedings denied).

Entry of Money Judgment

Rath next argues that the district court erred in entering the judgment against Rath because governmental units may not seek to enforce money judgments. Rath, relying on *In re Mansfield Tire & Rubber Co.*, 660 F.2d at 1113, 1115, argues that the scope of the district court's order far exceeds the limited police power exception of 11 U.S.C. § 362(b)(5). Rath argues that the district court order established a payment plan, imposed prejudgment interest, and elevated EEOC to the status of a favored creditor with 100% payment.

EEOC argues that the district court judgment does not violate § 362(b)(5). Specifically EEOC argues that § 362(b)(5) only prohibits actions to enforce or execute a money judgment, and the judgment in this case is not self-executing. Relying on *Penn Terra*, EEOC argues that it is the "seizure of a defendant debtor's property, to satisfy the judgment . . . which is proscribed by subsection 362(b)(5)." 733 F.2d at 275. EEOC further asserts that during the pendency of the bankruptcy proceedings it will not file an action against Rath for contempt for failure to pay or otherwise attempt to actually obtain execution of the judgment.

Section 362(b)(5)[7] provides that the automatic stay does not apply to enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers. The reason for this ban against enforcement of money judgments is to prevent unfairness to a debtor's other creditors.

> Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

H. Rep. No. 595, 95th Cong., 2nd Sess. 342-43 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6299; S. Rep. No. 989, 95th Cong., 2nd Sess. 51-52 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838.

The entry of judgment for injunctive relief and backpay is permitted under § 362(b)(5), but the actual enforcement of the backpay judgment is not permitted. *E.g., NLRB v. Evans Plumbing Co.*, 639 F.2d at 293; *cf. In re Mansfield Tire & Rubber Co.*, 660 F.2d at 1115 (Industrial Commission of Ohio, Bureau of Workers Compensation, could adjudicate workers' compensation claims against the debtor and could order payment of the claims only because the claims were to be paid either from

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7. 11 U.S.C. § 362(b)(5) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

. . . .

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . .

an insurance fund or surety bonds, neither of which were a part of the debtor's estate).

We hold that the district court did not err in entering a money judgment against Rath. The district court, however, went beyond the entry of a money judgment as permitted by § 362(b)(5) and established a detailed payment plan. The judgment of February 10, 1984, not only awarded EEOC the sum of $1,000,000, but required Rath to repay the sum in five equal installments of principal with accrued interest, with the first installment due on February 10, 1985. Failure to meet a required installment results in acceleration of the unpaid balance at the option of EEOC. EEOC was also directed to formulate a plan for disbursement of judgment proceeds and to set up a claims system. This plan went beyond the entry of a money judgment and therefore violated 11 U.S.C. § 362(a).

Rath also argues that the establishment of a payment plan violates 11 U.S.C. § 1129.[8] We agree. The bankruptcy court has the responsibility to confirm a reorganization plan and to distribute Rath's assets in accord with this plan. Payment of the EEOC claim, a pre-petition unsecured claim, may not be given preference over the claims of other creditors. Neither EEOC's promise not to collect the judgment nor the possibility that the bankruptcy court will modify the payment plan is sufficient to correct the error.

Rath further argues that the imposition of post-judgment interest is contrary to 11 U.S.C. § 502(b) which prohibits the imposition of interest after the date of the

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8. 11 U.S.C. § 1129(a)(1) provides: "(a) The court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of the chapter."

bankruptcy filing. We agree that the district court erred in awarding post-judgment interest. Section 502(b)[9] provides that as of the date of the bankruptcy filing, interest will not accrue and any claims for unmatured interest which become due after the filing date shall be disallowed. *Nicholas v. United States*, 384 U.S. 678, 682 (1966); *In re Boston & Maine Corp.*, 719 F.2d 493, 495 (1st Cir. 1983), *cert. denied*, 104 S. Ct. 1913 (1984). The purpose of this rule is stated in *Vanston Bond Holders Protective Committee v. Green*, 329 U.S. 160, 163-64 (1946):

> Exaction of interest where the power of the debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of a delay in prompt payment— a delay necessitated by law . . . . The delay in distribution . . . is a necessary incident to the settlement of the estate . . . it would be inequitable for anyone to gain an advantage or to suffer a loss because of such delay.

Subjective Hiring Practices

Rath next argues that the district court erred in holding that there was no business necessity for Rath's subjective hiring practices. Rath had no established criteria

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9. 11 U.S.C. § 502(a), (b), (2) provides:

(a) A claim of interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

. . . .

(2) such claim is for unmatured interest . . . .

for selecting employees. Rath argues that the positions, although unskilled in nature, require certain objective skills and experience because an employee might be forced to perform any job in the plant. Rath also argues that it should not be required to adopt what the court perceives to be the best hiring procedures rather than those which Rath has developed based on its experience. Lastly, Rath argues that the district court did not distinguish between the strict test of a bona fide occupational requirement and the less strict test of a valid business reason.[10]

EEOC argues that the district court's finding is supported by the overwhelming weight of the evidence and therefore is not clearly erroneous. EEOC argues that McFarland, the Rath official primarily responsible for hiring at Rath, was unable to articulate any particular qualifications or attributes he looked for in an applicant. EEOC also argues that Rath failed to establish that the subjective hiring procedures were necessary or essential and that

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10. The district court correctly applied the business necessity test in this case. The business necessity defense and the bona fide occupational qualification (BFOQ) defense are both defenses to Title VII violations. The business necessity defense, however, is appropriately raised when facially neutral employment practices have a disproportionate impact on protected groups. The BFOQ defense on the other hand is a defense to affirmative deliberate discrimination on the basis of sex. *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670, 674 (9th Cir. 1980); *Garcia v. Gloor*, 609 F.2d 156, 163 (5th Cir. 1980); *see Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (BFOQ) (standard applied to regulation prohibiting employment of female guards in maximum security prison; business necessity test applied to height and weight regulation). Both defenses have been construed narrowly. Sex discrimination based on a BFOQ is permitted only where "reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e(2)(e). A neutral employment practice may be justified by business necessity only if the practice not only fosters safety and efficiency but is essential to that goal. *United States v. St. Louis-San Francisco R.R.*, 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

there were no alternative practices with less discriminatory effect.

"[A]n employment practice which has a disparate impact on a group protected under Title VII is invalid unless the employer can prove the challenged practice is justified by a business necessity." *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir. 1980). "'The touchstone is business necessity and the practice must be shown to be necessary to safe and efficient job performance . . . .'" *Id.* (citations omitted). "The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal." *United States v. St. Louis-San Francisco R.R.*, 464 F.2d 301, 308 (8th Cir. 1972) (emphasis added), *cert. denied*, 409 U.S. 1116 (1973). A business practice may not be justified on the basis of business necessity if there exists a "nondiscriminatory alternative means of determining qualification." *Id.* at 309; *see Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

We hold that the district court did not err in holding that Rath's subjective hiring practices were not justified by business necessity. The undisputed evidence established that Rath's subjective hiring practices had a disparate impact on women. Ninety-five percent of Rath's employees were men. After EEOC established the disparate impact of the subjective hiring practices, Rath had the burden of producing evidence of business necessity and the burden of persuasion on that issue. Rath was unable to identify the criteria and qualifications which were considered in the hiring decisions. It follows therefore that Rath could not establish that these qualifications and criteria were necessary to the safety and efficiency of its operations. Rath's hiring practices, even if intended to select the best qualified person, were highly susceptible

to abuse. While some subjectivity is inevitable in the hiring process, the total lack of objective criteria at Rath "could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment." *Stewart v. General Motors Corp.*, 542 F.2d 445, 451 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). "'[S]ex is the sole indentifiable factor explaining the divergence in numbers of men and women selected by Rath during the relevant time frame.'" *EEOC v. Rath Packing Co.*, No. 77-57-D, slip op. at 6 (liability order of April 22, 1981) (citation omitted).

Backpay Award

Rath next argues that the district court erred in awarding backpay. In support of this position, Rath argues that the district court failed to make findings concerning Rath's ability to pay or to articulate reasons for its decision. Rath also argues that the district court failed to consider the number of victims and the number of nonvictims affected and the economic circumstances of the industry.

Rath argues that it has experienced "horrendous losses" since 1977[11] and therefore does not have the ability to pay the award out of current resources, either borrowed or owned. Rath argues that the employees, the majority

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11. Rath argues that its financial position is precarious and a backpay award plus interest could result in the permanent closing of the Columbus Junction plant and the loss of jobs. Rath argues that it has had to resort to extraordinary means to secure even a limited line of credit (about $15 million), and that this credit and other loans made by Rath are secured by Rath's inventory, receivables, trademarks of the company, and real property. The company pension plan was terminated for financial reasons in 1982 and Rath continues to make sizable payments to reduce its obligations under the plan. Rath is also required to make cash deposits for performance bonds. The employees in 1983 deferred $2.50 each per hour in wages and made other concessions in order to sustain the company.

owners of the company, are the only ones who can provide funds to satisfy such an award and they have already made many financial sacrifices for the company.

Rath urges this court to review this issue because the issue is based almost entirely on the written record and not upon the testimony of witnesses. Lastly, Rath argues that it may have no forum to have this issue reviewed if this court does not review it because EEOC will argue in the bankruptcy court that the issue is "res judicata" and, secondly, the bankruptcy court may believe that it does not have the authority to modify the district court's order.

EEOC argues that the district court did not abuse its discretion in awarding backpay. EEOC argues that persons who have been denied employment because of discrimination are entitled under Title VII to backpay and backpay is to be denied only in extraordinary circumstances.

"The district court is obligated to grant a plaintiff who has been discriminated against . . . the most complete relief possible." *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 347 (8th Cir. 1984); *see Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976). There is a strong presumption that persons who have been discriminated against are entitled under Title VII to backpay; this presumption can only be overcome "for reasons, which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injury suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). "[S]pecial factors which justify not giving an award of class wide backpay have been narrowly construed," *Kirby*

v. Colony Furniture Co., 613 F.2d at 699; *see Wells v. Meyer's Bakery*, 561 F.2d 1268, 1272 (8th Cir. 1977), and usually include circumstances where state legislation is in conflict with Title VII. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974) (banc).

We consider first Rath's argument that the district court was required to state its reasons in support of the award of backpay. Rath cites two district court cases for the proposition that a district court must state reasons for an award of backpay. *Ingram v. Madison Square Garden Center*, 482 F. Supp. 918, 921 (S.D.N.Y. 1979); *Rios v. Enterprise Ass'n of Steamfitters Local 638*, 400 F. Supp. 988, 991 (S.D.N.Y. 1975). Rath also attempts to argue by analogy from other cases which state that a district court must identify the factors which justify the denial of backpay. The rationale, however, underlying the requirement for a statement of reasons for a *denial* of backpay does not exist where a district court grants backpay. A presumption exists in favor of backpay; backpay may be denied only if there are compelling reasons justifying the denial. Consequently, the district court is required to state reasons for the denial in order that a reviewing court may determine if compelling reasons exist. We hold that the district court did not err in failing to identify those specific factors it considered in awarding backpay.

Rath next argues that the district court did not consider Rath's ability to pay prior to granting backpay. The record does not support Rath's assertion. The special master considered at length Rath's financial condition. The special master found that the factors militating against an award of backpay—(1) Rath's "precarious financial status and ongoing losses," (2) 60% of the shareholders

are employees, and (3) Rath's stated inability to liquidate an award without further employee concessions—were not of sufficient weight or so exceptional that they overcame the presumption that backpay is one of the consequences of Title VII violations.

The district court approved and adopted the report and recommendation of the special master except as modified. The district court did not modify the special master's findings or recommendation on backpay except to round the backpay award off to $1,000,000. Further, the district court specifically considered and overruled Rath's objection to the special master's recommendation for backpay. *EEOC v. Rath Packing Co.*, No. 77-57-D, slip op. at 7 (order of Feb. 10, 1984). Rath challenged the recommendation on the grounds that Rath was unable to pay the award and the award would have an adverse effect on the employees at the Columbus Junction plant. In response to this objection, the district court did not indicate that Rath's financial condition was not considered in making the backpay award. Rather, the district court expressly recognized that "[t]he effect of this backpay award can now be taken into consideration by the bankruptcy court." *Id.* at 3. The district court in the same order expressly considered Rath's financial condition in awarding post-judgment interest. *Id.* at 7. The district court denied prejudgment interest because of Rath's "precarious financial condition" and ordered installment payments of the award for the same reason. *Id.*

We hold that the district court did not abuse its discretion in awarding backpay. Victims of employment discrimination are entitled to "make-whole" belief, which includes backpay. Backpay should not be denied simply because the employer, who has wronged the victims, will

be adversely affected by the backpay award. *See Frank v. Bowman Transportation Co.*, 424 U.S. at 774. The impact of the award on Rath's employees, who are also the majority stockholders, is an insufficient reason to deny backpay. These employees were aware of this litigation, which commenced in 1977, when they purchased their stock in 1983. In addition they received benefits from the purchase of the stock—the continuation of their employment and compensation. *See In re Rath Packing Co.*, 36 Bankr. 979, 981 (Bankr. N.D. Iowa 1984). It is not inequitable that the employees-shareholders, having received the benefits of ownership, should share the detriment resulting from the backpay award.

Denial of Rule 60(b) Motion

The district court denied Rath's Fed. R. Civ. P. 60(b) motion on the basis that the evidence offered by Rath did not constitute newly discovered evidence and "for other reasons expressed in [EEOC's] response to defendant's motion." The district court found that the evidence tendered as newly discovered evidence was formulated after the trial.

Rath argues that the district court abused its discretion in denying its motion. Rath submitted a report concerning its hiring procedures upon reopening its Columbus Junction facility in July 1984. The report covered the four months from the time the Columbus Junction facility opened in July 1984 to October 1984, when it closed again. Rath claims that the report reflects the actual level of interest of women in employment at Rath and the actual employment experience of women who accepted employment at Rath during this period.

EEOC argues that the motion was not filed within a reasonable time as required by the rule. The motion was

filed seven months after the entry of judgment. EEOC also argues that the evidence was not newly discovered evidence because it was formulated after the trial and concerned only post-trial events, that is, Rath's hiring practices and experience after the trial. EEOC further argues that the evidence is neither probative of nor relevant to the issue of Rath's liability.

In order to obtain relief under Fed. R. Civ. P. 60(b)(2) on grounds of newly discovered evidence, the moving party must establish that (1) evidence was discovered after trial, (2) it exercised diligence to obtain the evidence before trial, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence is such that a new trial probably would produce a new verdict. *Rosebud Sioux Tribe v. A. & P. Steel, Inc.*, 733 F.2d 509, 515 (8th Cir.), *cert. denied*, 105 S. Ct. 565 (1984). The district court's ruling on a motion for relief from judgment will be disturbed on appeal only if the district court abused its discretion. *Pioneer Insurance Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977).

We hold that the district court did not abuse its discretion in denying Rath's motion. The report of Rath's hiring practices and experience for the period of July through October 1984 was not evidence which was in existence at the time of the trial but was evidence which was formulated after the trial. Further evidence of Rath's hiring practices and experience after the trial is not relevant to the issue of Rath's liability prior to trial.

No-Spouse Rule (Cross-appeal)

EEOC on cross-appeal argues that the district court erred as a matter of law and fact in holding that Rath's no-spouse rule was justified by business necessity.

EEOC argues that the district court, although articulating the proper legal standard, in fact imposed a lighter burden on Rath than required by the law of this circuit. EEOC further argues that this finding is contrary to the record evidence and inconsistent with the district court's subsidiary findings.

The district court stated that "the issue the court must address is . . . whether management's response to *perceived* production problems . . . was *reasonable* . . . and designed to improve conditions in the plant." *EEOC v. Rath Packing Co.*, slip op. at 23 (order of Apr. 22, 1981) (emphasis added). The district court found that Rath was "unable to statistically corroborate its contention that production was adversely affected through the hiring of spouses." *Id.* The district court nonetheless ultimately concluded that Rath had demonstrated "an acceptable business-related basis for the rule," *id.* at 24, and that the "anti-spousal policy was enacted to achieve the interrelated business objectives of optimum production and employee performance." *Id.* at 20.

Rath urges this court to depart from its strict test of business necessity and to follow the less demanding standard applied by the Seventh Circuit in *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977) (*Yuhas*), *cert. denied*, 435 U.S. 934 (1978), and by the district court in this case. Rath argues that the court in *Yuhas* correctly recognized that spousal relationships in the workplace create situations which are problematic for the employer and employees—problems of efficiency, productivity and ease of management. Rath argues that its no-spouse rule was directed at problems which had occurred when married couples worked at Rath; these problems were dual absenteeism, vacation scheduling, supervision, and employee pressure to hire spouses.

As we have previously stated, Title VII forbids the use of a facially neutral employment standard which disproportionately excludes a protected class from employment unless the employer shows that the standard is justified by business necessity. "[T]he employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.'" *Dothard v. Rawlinson*, 433 U.S. at 329, *citing Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

> [T]he proper standard for determining whether "business necessity" justifies a result which has a . . . discriminatory result is not whether it is justified by routine business considerations but whether there is a *compelling need* for the employer to maintain that practice and whether the employer can prove there is no alternative to the challenged practice.

Kirby v. Colony Furniture Co., 613 F.2d at 705 n.6 (emphasis in original); *see Gilbert v. City of Little Rock*, 722 F.2d 1390, 1395 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 2347 (1984).

We hold that the district court applied the wrong legal standard in determining whether the no-spouse rule was justified by business necessity. The district court did not consider whether there was a compelling need for the no-spouse rule.[12] In order for Rath to prevail, the problem

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12. The standard which this circuit applies in this case is consistent with the law in the majority of the other circuits. *See Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 93-94 (6th Cir. 1982); *Jackson v. Seaboard Coastline R.R.*, 678 F.2d 992, 1016-17 (11th Cir. 1982); *Williams v. Colorado Springs School Dist.*, 641 F.2d 835, 840-42 (10th Cir. 1981); *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 245-47 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

to be addressed by the no-spouse rule must be concrete and demonstrable, not just "perceived"; and the rule must be essential to eliminating the problem, not simply reasonable or designed to improve conditions. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 248 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

Application of the proper legal standard to the district court's factual findings compels the conclusion that Rath failed to demonstrate that the no-spouse rule was justified by business necessity. Rath asserted that dual absenteeism was a problem when both spouses worked for Rath. The district court found, however, that from March 3, 1975, to May 31, 1978, "spouses exhibited a lower absentee rate than did non-spouses." *EEOC v. Rath Packing Co.*, slip op. at 21 (order of Apr. 21, 1981). The district court noted that Rath was able to point to only one incident of habitual dual absenteeism. The district court further found that production records between 1975 and 1978 revealed that "daily production was not detrimentally affected by the minimal dual spouse absenteeism during this period." *Id.* The district court nonetheless held that "management's perception in 1973 of a disruptive effect upon plant operations . . . [was] rationally predicated upon sound business interests." *Id.*

Secondly, Rath asserted that the presence of both spouses in the work force caused problems in scheduling vacations. The district court found that "the two most serious difficulties connected to spousal selection of vacation time were corrected when the company prohibited trading [of vacation time] in 1970 and initiated a policy in 1973 requiring all employees to indicate in the order of seniority their preference when canvassing is undertaken." *Id.* at 22. These two rules eliminated the vacation prob-

lems which had an impact on the efficiency of Rath's production.

The district court, however, felt that the actual scheduling of vacations was not the only factor to be considered, but that employee morale was crucial in the business necessity analysis of the problem. The district court found that "spouses remained dissatisfied with the present procedure" and that disgruntled fellow workers often applied for vacation times sought by a less senior spousal employee in order to prevent a couple from securing a joint vacation. *Id.* The district court, however, did not require Rath to demonstrate how staff morale affected the safety or efficiency of Rath's operation. Staff discontent and reduced staff morale as a result of the scheduling of spouses' vacations may not be the basis for the no-spouse rule unless these problems affect the safety and efficiency of Rath's operation.

Rath next asserts that the no-spouse rule was required in order to avoid problems associated with an employee's supervision of his or her spouse. Rath cited one instance where spousal supervision resulted in complaints of favoritism to and harassment of the supervised spouse. It is not sufficient that the rule be business-related; the rule must be essential to safety and efficiency. *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d at 249. There must be no other available nondiscriminatory alternative to accomplish the legitimate business purpose. *Dothard v. Rawlinson*, 433 U.S. at 329. In this case a nondiscriminatory alternative existed. The collective bargaining agreement permitted an employee to bid out of a position where the employee would be supervised by a spouse. Rath also could have negotiated for the right to assign employees so that they would not be supervised by spouses.

The last reason asserted by Rath for the no-spouse rule is employee pressure to hire spouses. Rath failed to demonstrate how this pressure resulted in lower production or decreased safety. Nor was there any showing by Rath that the pressure could not have been alleviated by a rule which did not have a discriminatory impact.

In summary, we hold that Rath failed to establish a business necessity for the no-spouse rule. Rath failed to show that the problems that Rath experienced in employing spouses had any demonstrable effect on safety and efficiency. Workers' morale, which Rath and the district court deemed crucial to the business necessity analysis, cannot justify implementing a discriminatory policy where the claimed dissatisfaction has not been shown to have resulted in reduced productivity, decreased job efficiency, or more dangerous working conditions.

We note further that Rath's reliance on *Yuhas* is misplaced. The Seventh Circuit in *Yuhas* upheld a no-spouse rule although the employer was unable to demonstrate that employment of spouses affected efficiency or safety. The court held that "[b]ecause the no-spouse rule plausibly improves the work environment, and because it does not penalize women on the basis of their environmental or genetic background," the rule was job related and did not violate Title VII. 562 F.2d at 500. The court stated however that its decision might have been different "if plaintiffs had shown that defendant historically employed more men than women . . . because it intentionally discriminated against women [The court assumed] that the present disparity between men and women . . . was the result of noninvidious factors." *Id.* The standard articulated in *Yuhas* therefore would not be applicable to this case because the district court found

Rath intentionally discriminated against women. This intentional discrimination against women resulted in Rath's employees being overwhelmingly male.

Denial of Prejudgment Interest (Cross-appeal)

EEOC argues that the district court erred in denying prejudgment interest because prejudgment interest, like backpay, is appropriate in order to promote the make-whole purpose of Title VII. EEOC further argues that the district court's decision, although discretionary, should be set aside because it was based on erroneous beliefs and an improper understanding of the law.

Rath argues that the district court did not abuse its discretion in denying prejudgment interest because there is no presumption in favor of prejudgment interest and interest should be denied where its exaction would be inequitable. Rath further argues that the district court's decision may only be set aside if there is no evidence in the record to support the district court's decision.

"Prejudgment interest serves at least two purposes: (1) it helps compensate plaintiffs for the true cost of money damages they have incurred, (2) where liability and the amount of damages are fairly certain, it promotes settlement and deters an attempt to benefit unfairly from the inherent delays of litigation." *General Facilities v. National Marine Service*, 664 F.2d 672, 674 (8th Cir. 1981); *see Behlar v. Smith*, 719 F.2d 950, 954 (8th Cir. 1983). The decision to award or deny prejudgment interest will be upheld unless the district court abuses its discretion. *Earnhardt v. Puerto Rico*, 744 F.2d 1, 3 (1st Cir. 1984).

The district court in this case denied prejudgment interest because of Rath's precarious financial situation. The district court also found that (1) the interest rates

which EEOC requested were rates which no member of the plaintiff class could reasonably have obtained had she possessed the funds, (2) the delay in determining Rath's backpay liability made an assessment of prejudgment interest inequitable and (3) an award of prejudgment interest would have required additional sacrifices by Rath employees. Report and Recommendation of Special Master, Sept. 30, 1983, at 41-43.

We hold that the district court did not abuse its discretion in denying prejudgment interest. The district court properly weighed the interest of the victims in make-whole relief against the financial impact of a prejudgment interest award in excess of one million dollars on Rath and its owner-employees.[13] The delay (although the fault of neither party) and the uncertainty in determining Rath's backpay liability, on which the interest is to be calculated, were also proper factors for the district court to consider. *Heiar v. Crawford County*, 746 F.2d 1190, 1201 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3500 (1985). We may not substitute our judgment for that of the district court in reconciling these competing interest.[14] *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir.), *modified on other grounds*, 742 F.2d 520 (1984).

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13. EEOC indicates that prejudgment interest on the backpay actually awarded amounts to $983,272.00. This figure does not include interest on the additional backpay to be awarded as a result of our decision expanding the relevant labor pool and holding that the no-spouse rule was not justified by business necessity.

14. The district court found that the interest rates requested by EEOC were rates which "no female employee could have reasonably obtained had she possessed the funds." We do not believe that a district court may deny prejudgment interest because the plaintiff requests interest at a rate which the court finds unreasonable. The district court may grant prejudgment interest at the rate which it determines to be fair and equitable.

(Continued on following page)

Denial of Retroactive Seniority (Cross-appeal)

The district court denied retroactive seniority because the "complexity of the problems accompanying retroactive seniority counsel against this particular remedy." The district court rejected the special master's finding that the problems envisioned by Rath—a delay in maximum productivity until training is completed and an undefined effect on the relationship of the workers—did not overcome the presumption in favor of retroactive seniority.

EEOC argues that the district court erred in denying retroactive seniority. Further, EEOC argues that diminution of seniority expectations of incumbent employees is clearly a usual and foreseeable impact of hiring claimants and giving them seniority. EEOC argues that this is not the type of unusual adverse impact contemplated by *Franks v. Bowman Transportation Co.*, 424 U.S. at 774-75, justifying a denial of seniority.

Rath argues that the district court did not err because retroactive seniority would result in bumping of long time employees to less desirable jobs, increase the pressure and strain on employees, lower employee morale, and create labor management problems.

In *Franks v. Bowman Transportation Co.*, the Supreme Court, in discussing retroactive seniority in Title VII cases, stated:

Footnote continued—

EEOC asserts that the rates used in computing the prejudgment interest were the IRS prime interest rates during the 1973 to 1980 period. We note that prejudgment interest awards based on the prime interest rates have been permitted by other courts. *E.g., EEOC v. Wooster Brush Co.*, 727 F.2d 566 (6th Cir. 1984); *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291, 1319-20 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1271 (9th Cir. 1982).

> [I]n exercising their equitable powers, district courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and . . . such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.

Id. at 779 n.41 (citation omitted).

The Court further stated: "We find untenable the conclusion that this form of relief may be denied merely because the interest of other employees may thereby be affected." *Id.* at 774-76. " 'Adequate protection of . . . rights under Title VII may necessitate . . . some adjustment of the rights of [non-victim] employees. The Court must be free to deal equitably with conflicting interests of [non-victim] employees in order to shape remedies that will most effectively protect and address the rights of the . . . victims of discrimination.' " *Id.* at 775-76 n.35 (citation omitted). Factors "such as the number of victims, the number of non-victim employees affected and the alternatives available to them and the economic circumstances of the industry," *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 376 n.62 (1977) (citation omitted), should be considered by the district court in determining whether to grant retroactive seniority.

In striking this equitable balance between the interests of the victims of discrimination and incumbent employees, courts have primarily been concerned that retroactive seniority relief not result in the discharge of "innocent" incumbent employees. In *Romasanta v. United Airlines, Inc.,* 717 F.2d 1140, 1147-56 (7th Cir. 1983), the Seventh

Circuit denied competitive retroactive seniority to a class of 1400 former employees. The court found that an award of competitive retroactive seniority would result in the discharge of hundreds of incumbent employees because there was a low attrition rate and a low growth rate in the company. *Id.*

The Ninth Circuit in *Moore v. City of San Jose,* 615 F.2d 1265 (9th Cir. 1980), stated that some effects on incumbent employees are justified to achieve the goals of Title VII. *Id.* at 1271. The court further stated that the burden is on the employer to demonstrate some unusual adverse impact which would justify the denial of retroactive seniority. *Id.* The court noted that the award of retroactive seniority would not result in the discharge of incumbent employees and further that the small number of victims would not affect the seniority-based benefits of incumbent employees.

This court in *Briseno v. Central Technical Community College Area,* 739 F.2d at 348, held that the relief granted a Title VII plaintiff may be limited so that innocent employees will not be displaced. This court nonetheless recognized that a plaintiff is entitled to be placed in a comparable position with his or her seniority and other rights to be determined as of the date he or she was denied employment. Where no vacancy exists, the plaintiff is entitled to receive monthly payments equal to the difference between what plaintiff would receive in a comparable position and what the plaintiff earned in mitigation of damages. These payments should continue until the plaintiff is hired by the employer. *Id.*

In the instant case, Rath did not allege nor did the district court find that the grant of retroactive seniority would result in the discharge of employees. Rath as-

serted that the imposition of retroactive seniority would result in the bumping of long time employees to less desirable jobs, lower employee morale, labor-management problems, and pressure and strain on employees. These consequences can be expected in almost all Title VII cases. Retroactive seniority, therefore, could never be imposed if such factors are sufficient to justify the denial of retroactive seniority.

We hold that the district court abused its discretion in denying retroactive seniority. Imposition of retroactive seniority is required in the present case in order to make the identified victims of the discrimination whole, and the district court offers no compelling reason for the denial of retroactive seniority.

Labor Force Statistics (Cross-appeal)

EEOC argues that the district court erred in refusing to use general population stastics to determine the number of women Rath would have hired absent discrimination and in determining the number of persons entitled to backpay. The district court used applicant flow data. EEOC argues that the qualifications for the positions at Rath are those which the general population possesses or can readily acquire. EEOC further argues that the number of women workers in the categories of nonfarm laborers and operatives in nondurable goods manufacturing and the number of women in Rath's applicant pool were depressed because of Rath's discrimination. EEOC argues that there was overwhelming evidence that women, in greater numbers than represented in these groups, were intrested in employment at Rath because the pay was good and the plant was close to their homes.

Rath argues that the district court correctly required EEOC to define the available qualified work force in

terms of those in the county who would actually be interested in jobs at Rath. Rath also argues that the applicant flow data is the best indicator of the extent of an employer's discrimination.

The district court in its opinion on liability found that "general population or civilian work force data" was appropriate to determine whether Rath discriminated against women and the number of persons affected by the discrimination because "entry level or unskilled positions was an issue and the necessary qualifications are those that many people possess or can readily acquire." *EEOC v. Rath Packing Co.*, slip op. at 6 (order of Apr. 22, 1981). In its later clarification order of December 1982, the district court held, however, that "general work force statistics have no probative value in determining whether [Rath's] . . . hiring practices adversely impacted against females." The district court reasoned that many persons engaged in jobs in nonmanufacturing industries would not be interested in employment at Rath because of the nature of the work. The district court held that the general work force statistics should not be used because in these statistics the number of women in nonmanufacturing industries was not separated from the number of women in nondurable goods manufacturing. The district court therefore relied on Rath's applicant flow data in determining liability and backpay.

A comparison of general population statistics with an employer's relevant work force is generally appropriate where the jobs in question do not require special qualifications. *Hazelwood School District v. United States*, 433 U.S. 299, 308 n.13 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. at 339-40 n.20; *EEOC v. Radiator Specialty*, 610 F.2d 178, 184 (4th Cir. 1979).

The burden is on the defendant to establish that the positions in question require special qualifications which are not possessed or readily acquired by the general population. *EEOC v. Radiator Specialty*, 610 F.2d at 184. The district court, however, is afforded a great deal of discretion in determining the relevant labor market. *Markey v. Tenneco Oil Co.*, 635 F.2d 497, 499 (5th Cir. 1981).

Rath failed to establish that the positions in question required special qualifications not possessed or readily acquired by the general population. As previously discussed, Rath could not identify any criteria it used in selecting employees or any common qualifications or skills that its employees possessed. Thus general population statistics were appropriate in determining the extent of Rath's discrimination against women and the amount of backpay. *Hazelwood School District v. United States*, 433 U.S. at 308 n.13; *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 839 (D.C. Cir. 1977); *Kaplan v. International Alliance of Theatrical & Stage Employees*, 525 F.2d 1354, 1358 (9th Cir. 1975); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970).

We hold that the district court erred in finding that the percentage of women employed in the nondurable goods manufacturing category was the appropriate population base because only these women would be interested in jobs at Rath. This finding rests on a faulty premise, that female representation in this category is a true indicator of women's interest in positions at Rath. The district court failed to consider the impact that Rath's discriminatory practices had on the size of this group. In 1978, 230 or approximately 45 percent of the women in the nondurable goods manufacturing category were employed by Rath. Rath's refusal to hire women, there-

fore, kept the number of women workers in this category lower than it would have been absent discrimination. If this category is used rather than general work force statistics in determining Rath's liability, Rath would benefit from its prior wrongful discrimination.

The use of Rath's applicant flow data is likewise inappropriate for the same reasons. Although applicant flow data is often the best indicator of the extent of an employer's discrimination, this is not the case where persons have been deterred from applying because of the employer's discriminatory practices.

> The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who are expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection . . . . The . . . message can be communicated by [the employer's] consistent discriminatory treatment of actual applicants . . . and even by the . . . composition . . . of [the] work force . . . .

International Brotherhood of Teamsters v. United States, 431 U.S. at 365.

This court has also recognized that "[t]he application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1299 (8th Cir. 1978) *citing Dothard v. Rawlinson*, 433 U.S. at 330, *cert. denied*, 459 U.S. 844 (1982).

In this case Rath's discriminatory practices deterred women from applying for employment. *See Donnell v. General Motors Corp.*, 576 F.2d at 1298. Rath was one of a few large employers in a small community of 1500 and its employment record was known in the community. There was uncontradicted testimony that women did not believe they would be hired at Rath. This perception was consistent with Rath's hiring practices. Only seven of the 95 women who applied from 1973-78 were hired; 157 of the 433 male applicants were hired. Ninety-five percent of Rath's work force was male. The use of Rath's applicant flow data to determine Rath's liability would not give an accurate picture of the number of women affected by Rath's discrimination.

On remand, the district court should utilize general work force statistics to determine Rath's liability and to compute the backpay award. The district court must also afford nonapplicants the opportunity to prove that they were deterred from applying by Rath's discriminatory practices. This is not an easy burden for the nonapplicant. *International Brotherhood of Teamsters v. United States*, 431 U.S. at 367-68.

> Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that [her] status is similar to that of the applicant, [she] must bear the burden of coming forward with the basic information about [her] qualifications that [she] would have presented in an application . . . . [T]he burden then will be on the employer to show that the nonapplicant was nevertheless not a victim of discrimination.

Id. at 369 n.53.

Costs (Cross-appeal)

EEOC argues that the district court abused its discretion in allocating 50 percent of the costs to each party. Rath argues that both parties were partially successful and therefore the district court was correct in allocating the costs equally.

Fed. R. Civ. P. 54(d) provides that costs are to be allowed as a matter of course to the prevailing party unless the court otherwise directs. "A party who has obtained some relief usually will be considered the 'prevailing party' . . . even if it has not succeeded on all of its claims." *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1287 (8th Cir. 1981); *see Coyne Delany Co. v. Capital Development Board*, 717 F.2d 385, 390 (7th Cir. 1983). "'[T]he prevailing party is prima facie entitled to costs and it is incumbent upon the losing party to overcome that presumption . . . [because] denial of costs is in the nature of a penalty for some defection . . . in the course of the litigation.'" *Walters v. Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977) (citation omitted); *see Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

EEOC is clearly the prevailing party in this lawsuit. EEOC was successful in the district court on two of its three claims: the disparate impact claim based on subjective hiring procedures and the disparate treatment claims. Our reversal of the district court on the third claim based on the no-spouse rule means that EEOC succeeded on all three claims. Neither Rath nor the district court identified any misconduct by EEOC which would warrant a denial of costs. *Chicago Sugar Co. v. American Sugar Refinery Co.*, 176 F.2d at 11. We therefore hold that EEOC should be awarded full costs. We need not

decide whether the district court's order equally dividing costs based on EEOC's partial success at the trial level was an abuse of discretion.

Accordingly, the judgment of the district court is affirmed in part and reversed in part, and this case is remanded for further proceedings consistent with this opinion.

ROSS, Circuit Judge, concurring in part and dissenting in part.

I must respectfully disagree with the majority's view that the district judge abused his discretion in declining to award retroactive competitive seniority to the EEOC. Moreover, I do not think the district judge erred in his definition of the relevant available labor pool for purposes of determining liability and computing backpay. In all other respects, I concur in the majority's opinion.

Denial of Retroactive Seniority

I do not agree that the district judge abused his discretion in denying retroactive competitive seniority. "[T]he statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another, and * * * these choices are, of course, left in the first instance to the district courts." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 779 (1976).

As the majority notes, Rath's opposition to full retroactive seniority is based among other concerns on the prospect that long-term employees will be bumped to less desirable jobs. We recognized in *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984), cited by the majority, that the choice

of remedies discussed in *Franks* permits a district court to limit relief so that innocent incumbent employees will not be displaced. In *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980), also cited by the majority, the Ninth Circuit noted that retroactive seniority in the circumstances of that case would cause no existing employees to lose their jobs, and "the number of returning employees was small enough that their impact on the seniority-based benefits of incumbent employees would be minimal."

Thus, while I am not opposed to an award of non-competitive "benefit" seniority[1] to appropriately indentified victims of Rath's discriminatory policies, I would affirm the district court's denial of competitive seniority in this case. In light of the number of persons now rightfully entitled to a place in Rath's work force as the result of the company's years of discriminatory hiring, as well as Rath's current financial status and the certainty that incumbents will be bumped to lower positions, I consider the district court's adjustment of the remedy to account for incumbent employees appropriate. The retention of a full work force by a company which has experienced "horrendous losses" since 1977 and which is presently

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1. "Benefit"-type seniority refers to the use of a worker's earned seniority credits in computing his level of economic "fringe benefits." Examples of such benefits are pensions, paid vacation time, and unemployment insurance. "Competitive"-type seniority refers to the use of those same earned credits in determining his right, relative to other workers, to job-related "rights" that cannot be supplied equally to any two employees. Examples can range from the worker's right to keep his job while someone else is laid off, to his right to a place in the punch-out line ahead of another employee at the end of a workday.

Franks v. Bowman Transp. Co., 424 U.S. 747, 782 n.1 (1976) (Powell, J. concurring in part and dissenting in part).

in bankruptcy seems to me exceedingly unlikely. *See Romasanta v. United Air Lines, Inc.*, 717 F.2d 1140, 1147-56 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1928 (1984) (declining to award full, retroactive competitive seniority in light of the adverse impact on a substantial number of incumbent employees and certain economic conditions adversely affecting the defendant company's potential for growth).

Labor Force Statistics

In *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1293-94 (8th Cir. 1975), we recognized that generally three kinds of statistical comparisons may be used to establish whether a challenged employment practice has a disproportionate impact on a protected group in violation of Title VII. Two of these procedures involve resort to general population figures. The first examines whether "[women] as a class (or at least [women] in a specified geographical area) are excluded by the employment practice in question at a substantially higher rate than [men]." *Id.* at 1293. Another involves comparing the composition of the employer's work force with the composition of the population at large. *Id.* at 1294. The procedure which does not rely on general population data and which the district court used "focuses on a comparison of the percentage of [male and female] job applicants actually excluded by the employment practice * * *." *Id.*

The district court considered the EEOC's evidence in support of its reliance on general population statistics defective:

> While the Court believes that general population or similar work force data may be appropriate under

> certain circumstances, the Court is of the opinion that the failure to break the work force statistics for Louisia [sic] County into the job categories of "durable goods manufacturing" or "non-manufacturing" industries, eliminates any substantive probative value the statistics on the general population may have had. Because of the nature of the jobs offered by the Rath plant, the Court is of the opinion that many persons engaged in jobs in non-manufacturing industries would not be attracted to that type of work, although it may also be questionable whether this type of work would be attractive to many in the durable goods manufacturing. Such statistics would have had more validity than the general population figures.

I agree with the district court's analysis. I cannot accept the unsubstantiated premise advanced by the EEOC that the entire female component of the Louisa County, Iowa work force would have been interested in or qualified to perform the hog slaughtering and processing jobs at Rath. *See New York City Transit Authority v. Beazer*, 440 U.S. 568, 586 n.29 (1979):

> Although "a statistical showing of disproportionate impact [need not] always be based on an analysis of the characteristics of actual applicants," *Dothard v. Rawlinson*, 433 U.S. 321, 330, "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants" undermines the significance of such [general population] figures. *Teamsters v. United States, supra*, at 340 n.20.

I therefore consider the district court's use of applicant flow data appropriate.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

(Filed February 10, 1984)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	Civil No. 77-57-D
THE RATH PACKING COMPANY, et al., Defendants.	)	

RULING ON OBJECTIONS TO REPORT AND RECOMMENDATION OF SPECIAL MASTER

On July 8, 1982 this Court, pursuant to Rule 53 of the Federal Rules of Civil Procedure, appointed A. V. Hass of Chariton, Iowa Special Master in the above-entitled action. The directions to the Special Master are set out in that Order. On September 30, 1983 the Special Master filed his Report and Recommendation to which both parties have filed objections. After having examined the Report and Recommendation and the papers filed in connection with the objections and resistances, and after having examined the file in the case the Court is prepared to consider the Report and Recommendation and the objections thereto.

OBJECTIONS OF RATH PACKING COMPANY

Rath Packing Company has made twelve objections to the Report of the Special Master which will be considered in order.

1. Rath objects to the finding and conclusion in paragraph 31 of the Report insofar as "rounding" is accepted to find the number of positions denied to females in each year. Rath claims that rounding gives significance to a fractional portion of an employment position when there is no such thing. Rath claims that the impact of this rounding procedure resulted in an overstatement of $60,439 in the backpay award.

The parties had agreed that the formula proposed in Hameed v. International Association of Iron Workers, 637 F. 2d 506 (8th Cir. 1980) should be adopted for the computation of backpay. The Court agrees with the plaintiff that the formula approach is an approximation only and that Rath is now attempting to add certain realities to the formula approach. The Court is of the opinion that the Special Master properly applied the formula approach agreed to by the parties.

Rath's first objection to the Special Master's Report is overruled.

2. Rath objects to the findings of the Special Master in paragraph 35 because he did not require adjustments for discrepancies in computations of actual wages earned by female class members. Paragraph 35 refers to some discrepancies in the evidence relating to gross earnings of unhired females. He concluded that "authoritative allowance for imprecision would appear to cover all such discrepancies." The Court agrees. In actions like this it is impossible to arrive at an exact figure. There is no indication that the omission of the wages actually earned is so substantial that it would so distort the computation that an injustice would result. In addition, as it is the Court's intention to round off the computation of backpay to an even one million dollars, this procedure more than

offsets any discrepancy in the gross earnings of unhired females.

Rath's second objection is overruled.

3. Rath objects to the fact that the Special Master included Rath employees' benefits for dental, vision and prescriptions in connection with the backpay award. Rath claims that as these benefits are paid on a claim-made basis rather than as part of an insurance premium the amount of such benefits is speculative. The Court believes that the use of the average cost to employees who elected that coverage is a fair way to arrive at the value of those benefits. The figures for the monthly expense were properly included as part of lost wages.

Rath's objection number three is overruled.

4. In paragraph 4 Rath objects to the award of any backpay. This objection is based upon Rath's precarious financial condition and the claim that this backpay award could put the jobs of other employees at locations other than Columbus Junction in jeopardy. Since the filing of the objection, Rath has entered into a Chapter XI bankruptcy proceeding. The effect of this backpay award can now be taken into consideration by the bankruptcy court.

5. Rath's objection number 5 is related to a statement in paragraph 5 of the Report that Rath is uncritical of EEOC's calculation except in instances the Special Master referred too. This objection is related to the objections stated in paragraphs 1 and 3, which objections have been now been overruled by the Court. In addition Rath is also critical of the Government's failure to carry its burden of showing in the record that the applicants in the class were interested in employment at Rath throughout

the period during which their application contributed to the size of the backpay award. The Court finds that there is adequate support for the Special Master's findings in paragraph 27 and 30.

6. In paragraph J of the Special Master's Recommended Order and Decree he recommends the entry of a Judgment in favor of EEOC in the amount of $1,015,901 with interest at the rate of 10% from the date of his report. He recommends that Rath be permitted to pay the Judgment in five equal installments of principal with accrued interest to date of payment and sets the date of the payment of the first installment as October 1, 1984.

Paragraph J provides that in the event a required installment with interest is not paid, the entire unpaid balance will accelerate at the option of the plaintiff. Rath argues that post-judgment interest should run from the date of the Judgment and not from the date of the Special Master Report. It also objects to the acceleration of the unpaid balance upon default at the option of the plaintiff.

The Court is of the opinion that post-judgment interest should commence with the entry of Judgment which should coincide with the date this Ruling is filed. The Court recognizes the financial stress to which Rath is currently subjected and that it is being reorganized under Chapter 11 of the Federal Bankruptcy Act. In spite of this situation, the Court believes that this judgment-creditor should be entitled to the same rights as any other judgment-creditor. The Special Master's Report accommodates Rath by allowing payment of the Judgment over a five-year period. The Court believes that Rath should be required to keep the annual payments current. If it defaults on those payments, the plaintiff here should have the right to declare the entire unpaid balance with accrued interest due.

As the Court has earlier indicated, any award of backpay is imprecise and the use of the *Hameed* formula benefits the whole class rather than the individuals who might otherwise have been employed. In recognition of this fact the Court will make a minor alteration in the backpay award by rounding it off to an even $1,000,000.

Therefore, paragraph J of the Special Master's Recommended Order and Decree will be approved as herein amended by reducing the Judgment to $1,000,000 with interest at the rate of 10% from the date of entry of Judgment. The first installment with interest will be due one year from the date of the entry of that Judgment. In all other respects Rath's objections to paragraph J will be overruled.

7. Rath objects to the Special Master's finding of apparent agreement that tenure is equal between males and females for that determination. The Special Master makes reference to Bureau of Labor Statistics of the Department of Labor that a typical job tenure of women is approximately 75% of that of men. The existence of that statistic is not binding on the Special Master, and in the absence of evidence, showing its applicability to the local situation, the Court does not believe that the Special Master erred in treating the tenure of women and men as the same in this particular instance.

8. Rath objects to the failure of the Special Master to include in the Recommended Decree any recognition of this Court's finding that the defendants' no-spouse hiring rule was legal. The Court believes that it would be proper to include such a provision in the Judgment and Decree and will do so.

9. Rath argues that if a hiring quota is going to be a part of this Court's Order it should be recognized that

it may be impossible to obtain enough qualified female applicants at Columbus Junction to reach a 25% female work force. The Court believes that it would be appropriate to allow Rath, if the Columbus Junction plant reopens and if it fails to reach a 25% female work force, to show that it was impossible to do so (if proceedings are instituted to enforce this Order and Decree).

10. The Court agrees with Rath's objection to the finding in paragraphs 53 and 54 and the inclusion of paragraph H in the enclosed decree as it relates to retroactive seniority. The Court believes that adequate remedy is provided by the backpay award and the complexity of the problems accompanying retroactive seniority council against this particular remedy. The Court will eliminate the last sentence of paragraph H relating to retroactive seniority.

11. Rath's objection to paragraph M is rendered moot by this Court's decision to eliminate retroactive seniority as a remedy in the decree.

12. Rath objects to the Special Master's finding in paragraph 32 that the affirmative defense of limitations under 614.1(8) Code of Iowa has been abandoned. The Court is of the opinion that this affirmative defense was, if not specifically abandoned, abandoned in effect by failure to urge it at appropriate times during the course of these proceedings.

Rath's objection number 12 is therefore overruled.

OBJECTION OF EEOC

The Court overrules all of EEOC's objections. The Court does not believe prejudgment interest would be proper in view of Rath's precarious financial situation.

In the Court's opinion an award of $200,000 due each year for five years is an adequate award. The Court has retained jurisdiction for five years and if reporting requirements suggested by EEOC become necessary, they can be considered at that time.

IT IS THEREFORE ORDERED that the Report and Recommendation of Special Master is approved and adopted, except as herein modified.

IT IS FURTHER ORDERED that the Clerk of the District Court shall enter Judgment in favor of the plaintiff and against the defendant as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

A. That the word "defendant" herein is intended to describe and does describe The Rath Packing Company and its agents, officers and employees having direct or indirect responsibility for the operation of Rath's Columbus Junction plant and the hiring of employees at said location.

B. That the Court shall retain supervisory jurisdiction over this matter and its parties for a period of five years following the entry of the decree unless sooner terminated voluntarily by it or for cause shown. Any party shall have the right to request the Court's intervention for reasons shown upon timely notice to the other party or parties affected.

C. That during the period that the Court retains supervisory jurisdiction over the case and its parties, defendant shall maintain the following records referable to its Columbus Junction operations:

(1) All applications for employment;

(2) All employment tests, interview notes, reference checks and investigative reports on applicants;

(3) An applicant-flow log, kept separate from applications, showing the name of each applicant, the applicant's sex and the date of the application;

(4) All advertisements for the hiring of employees;

(5) All personnel files of employees working for defendant at any time during this period;

(6) All other documents which relate to defendant's procedures and criteria for new hires; and

(7) All documents which relate to the discharge of any female employee.

D. That the defendant is perpetually enjoined from engaging in any act or maintaining any policy that has the purpose or effect of discriminating, on the basis of sex, in the hiring of employees at its Columbus Junction facility, except as herein expressly authorized. By decision of the Court Rath's no spouse hiring rule has been approved and therefore expressly authorized.

E. That the defendant, within 60 days after the entry of this decree or within 60 days after reopening its Columbus Junction plant, whichever is later, shall develop, file and serve upon the other parties objective selection procedures which it has adopted for the hiring of new employees there. Those procedures which shall not discriminate against prospective female applicants shall become effective only after the eligible females listed in Appendix A attached hereto have either been hired or have declined an offer of employment or have been found disqualified.

F. In the event plaintiff believes that defendant's selection procedures and criteria are not being followed by defendant or have need of amendment to carry out better the intent of this Decree at any time during the period the Court retains jurisdiction over this matter, the plaintiff shall notify the defendant in writing of the facts upon which it relies and request corrective measures. Within 30 days of the defendant's reply, the plaintiff shall notify the defendant in writing of either the plaintiff's acceptance of the defendant's position or the reason said position is unacceptable and, if applicable, any revised corrective measures. If the defendant does not take the action requested by the plaintiff within ten days after the plaintiff's notification, the parties will submit their respective positions to the Court for resolution.

G. That nothing herein contained is intended to interfere with the orderly and preferential recall of those persons who were employed at Columbus Junction when it closed on January 24, 1983.

H. That after reopening its Columbus Junction plant and until those physically and mentally able females listed in Appendix A have been employed or have declined employment when offered, the defendant shall hire one qualified female production worker at said plant from among those listed in Appendix A for each male production worker hire there after said reopening. Offers to hire will be made in the order in which the names of females appear in Appendix A.

I. When the names of those in Appendix A have been exhausted because of physical or mental disqualification, acceptance of employment or its refusal defendant shall thereafter hire not less than two females from among the

female applicants then qualified under its adopted selection procedures for every three male production workers hired until the percentage of females is at least 25% of the production work force at Columbus Junction on or before the expiration of five years after the date hereof. That percentage, within reasonable limits, shall be maintained thereafter. If proceedings are instituted to enforce this provision, Rath may attempt to prove that it was not reasonably possible for Rath to comply with this provision.

J. That judgment for the use of the class members shall be entered against The Rath Packing Company in favor of Equal Opportunity Employment Commission for the sum of $1,000,000 with interest thereon at the rate of 10% per annum from the date hereof. Said judgment and interest, unless otherwise settled, may be paid by the judgment debtor in five equal installments of principal together with accrued interest to date of payment, the first such installment with interest to mature one year from the date this Judgment is filed, and subsequent installments with interest to mature annually thereafter. Failure to meet a required installment with interest will accelerate the unpaid balance in full together with the accruing interest at the option of the plaintiff.

K. That under the supervision of the Court, EEOC shall formulate a plan for disbursement of the judgment proceeds for the Court's approval, it shall give written notice to the members of the class entitled thereto that they must claim their respective share of said proceeds within 30 days after said notice given or forfeit her participation therein, shall attend to the proper distribution of said proceeds among class members and, upon their acceptance, obtain releases which will protect the defendant

from further liability to a class member thus paid. No class member shall receive more than her actual loss of earnings plus post-judgment interest thereon.

L. That no female shall be knowingly retaliated against by defendant because of her participation in this litigation or any of its benefits.

M. That the petition should be dismissed as against the defendant District Local 431 Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO.

N. That the costs of the action should be paid by the parties in the following percentages: Plaintiff, 50%, and The Rath Packing Company, 50%.

Signed this ..... day of February, 1984.

/s/ W. C. Stuart
W. C. Stuart, Chief Judge
Southern District of Iowa

APPENDIX C

(Filed September 30, 1983)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	Civil No. 77-57-D
THE RATH PACKING COMPANY and DISTRICT LOCAL 431 AMALGAMATED MEATCUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Defendants.	)	

REPORT AND RECOMMENDATION OF SPECIAL MASTER

PRELIMINARY STATEMENT

1. Mary Turner, an unhired applicant for work at the hog slaughtering plant owned and operated by The Rath Packing Company (Rath) at Columbus Junction, Iowa, wrote a letter to the Equal Employment Opportunity Commission (EEOC) on December 12, 1975, which was received on December 15, 1975. She claimed in her letter that, because of their sex, she and other females seeking employment by Rath were victims of discrimination. The charge was processed through EEOC channels, conciliation failed and notice of such failure was served upon Rath.

2. In this action brought by EEOC on September 1, 1977, against Rath and District Local 431 Amalgamated Meatcutters and Butchers Workmen of North America, AFL-CIO (Union), plaintiff alleged, in reliance upon Section 706(f)(1),(3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., that Rath had violated Section 703(a) of that Title.

3. The unlawful practices which EEOC perceived as being within the scope of the Complaint were Rath's failure to hire qualified females only because of their sex and its maintenance of a "no-spouse" rule after August 1, 1973.

4. On April 24, 1978, disposition of the case was bifurcated to separate the issue of liability from that of relief.

5. The Rath facility at Columbus Junction was closed between June 15, 1978, and September, 1979. Employment applications after February 15, 1978, until October, 1979, were destroyed by Rath about when the plant reopened.

6. On September 12, 1979, the Union's motion for partial summary judgment on the liability issue was sustained. It was removed from that phase of the case but its participation in any relief hearing was ordered.

7. On February 13, 1980, Rath denied the allegations of the Complaint generally. It also raised an affirmative defense not argued on brief that claims for unpaid wages antedating September 15, 1975, were barred by Section 614.1(8), Code of Iowa, 1979, which requires actions for wages to be commenced within two years after the cause accrued.

8. Trial was had to the Court in July, 1980. Evidence was presented concerning Rath's specific failure

to employ Nancy Conaway, Doris O'Connor, Mary Turner, Christine Hedrick, Louise MacEachern, Janice Stoneking and Linda Crumly. Statistical evidence bearing on the issues was also presented. The record was supplemented thereafter and Post Trial briefs were furnished.

9. Memorandum Opinion and Order were filed on April 22, 1981, in which it was found that EEOC had made out a prima facie case of discriminatory impact based upon applicant flow data beginning January 1, 1973, and that it was not successfully rebutted by Rath generally. Rath's no-spouse rule, however, was found to be justified by business necessity. It was determined also that Doris O'Connor, who applied on November 16, 1976, and again in 1979 but wasn't hired was a victim of actual discrimination. Nancy Conaway, an employee's spouse who was eligible between July 27, 1973, and August 1, 1973, and Louise MacEachern, an employee's spouse who was eligible from 1966 until August 1, 1973, were also found to be victims of actual discrimination. Further, Rath did not establish that any special qualifications were required for entry jobs at its Columbus Junction plant.

10. Partial summary judgment on the issue of liability was directed in accordance with the following:

> "IT IS FURTHER ORDERED that the parties shall, within thirty (30) days from the date of this Order, submit briefs addressing the issue of appropriate relief in light of the Court's determination of liability. This discussion should encompass the question of whether the non-party discriminatees, O'Connor, Conaway and MacEachern, are entitled to relief. Each party shall have ten days thereafter to file reply briefs. If it is determined that the foregoing persons are not entitled to some relief, judgment for Rath would be proper.

If it is determined that relief is proper the question of relief shall be set down for hearing in its regular course."

11. In its Brief on Appropriate Relief filed May 22, 1981, EEOC stated its positions as follows:

a. Class relief is proper regardless of the identity or nonparticipation of the original complainant as a party.

b. All unsuccessful female applicants for work before August 1, 1973, are presumptively entitled to relief.

c. All unsuccessful non-spouse female applicants for work after August 1, 1973, are presumptively entitled to relief.

d. Females chilled by Rath's hiring policy so that they did not apply for work should be presumptively entitled to relief.

e. Backpay based on *Hameed, et al. v. Iron Workers, Local 396,* 637 F2d 506 (8th Cir. 1980) should be awarded. The computation, however, should be based on 1970 census data for the female work force in Louisa County, Iowa, rather than upon applicant flow data because Rath's known discriminatory policy against female employment at Columbus Junction deterred females from applying for work there.

f. Backpay should accrue under Section 706(g) beginning two years prior to the charge made by Mary Turner on February 7, 1976.

g. Classwide backpay is proper due to the complexity of the factual situation. The award should be distributed pro rata among those aggrieved subject,

however, to a limitation that no class member receive more than her actual damages. Notice to claim damages should be given to members.

h. Relief should include imposition of a hiring quota which will reserve 50% of the openings to females until the percentage of females employed at Columbus Junction equals the percentage of females in the local labor force. The openings should be offered first to eligible females who applied unsuccessfully for positions and to those who would have applied except for Rath's known anti-female employment policy.

i. Retroactive seniority should be granted to each female accepting employment, such seniority to date from the first filling of a vacancy after her application.

j. Injunctive relief against discrimination in employment should be ordered consistent with the Uniform Guidelines on Employee Selection Procedure.

k. Supervisory jurisdiction should be retained and reporting requirements required for five years.

l. EEOC should have judgment for the costs under Rule 54(d).

12. Rath claimed in its Proposed Findings and Conclusions filed on May 27, 1981, that there was no remedial issue except for O'Connor, Conaway and MacEachern who never filed charges and who are not members of an established class. They are nonparty strangers to this proceeding and lack standing to seek a remedy. Since the Court is without jurisdiction to provide them with a remedy, judgment should be entered for Rath.

13. EEOC sought leave on June 8, 1981, to advertise for identity of females who would have applied for work

at the Rath facility between January, 1973, and the present as well as those who had applied in August, September and October, 1979.

14. On June 18, 1981, the Court entered a Clarification Order to the effect that EEOC had predicated its prima facie case of discrimination upon applicant flow data for the period between January 1, 1973, and February 15, 1978, and upon census data for 1971. The Order entered was that O'Connor, Conaway and MacEachern could recover only as members of the class, not having intervened to seek individual awards.

15. Rath's Brief As To Remedy filed on August 19, 1981, asserts:

a. Injunctive relief involving the Uniform Guidelines on Employee Selection Procedure is improper. Those guidelines relate to testing and objective standards while here there was only subjective hiring by Rath. It makes no objection to an injunction against future discriminatory hiring procedures.

b. Rath should be permitted at the relief hearing to show nondiscriminatory reasons for refusing any particular applicant for a vacancy.

c. Successful applicants should be removed from the class because their very employment is inconsistent with a finding of discrimination.

d. The Court's discretion should be exercised against an award of backpay.

e. If a backpay award is made, the formula in *Hameed*, supra, is agreeable except that Rath prefers not to select random earnings of employees and class members for comparison. It believes a better solution is

to total the mitigating earnings of all class members for actual hours worked, divide the total by the number in the class and multiply that average by a number of class members comparable to the number of males whose earnings for hours worked were considered.

f. Hiring quota is premature because past discrimination has not been shown. Also, because many of the jobs are undesirable for females it hasn't been shown that Rath's personnel would ever reflect the percentage of females in any sample of employable population. Some kind of preference for class members retaining interest in employment at Columbus Junction is not objectionable.

g. Retroactive seniority is unfair to other employees, will be generally demoralizing and will disrupt labor-management relations.

h. Retention of supervisory jurisdiction is approved.

16. On September 2, 1981, the Court refused EEOC's Motion to Advertise for chilled applicants but granted it insofar as it sought to locate females who had applied for work in August, September and October, 1979, during which time applications had been destroyed.

17. On September 25, 1981, EEOC filed a Motion to Exclude Evidence at the relief hearing with respect to lack of qualifications of any female applicant as a non-discriminating reason for failure to hire that applicant. Rath resisted this Motion and by Order on October 9, 1981, the Court treated it as a Motion in Limine to be held in abeyance until trial of the relief issue.

18. Difficulties arose over the method of obtaining the testimony of class members and on November 9, 1981,

EEOC filed a Motion to Require Rath to Defray Deposition Costs or, alternatively, order the testimony obtained by interrogatories. On November 10, 1981, ruling was made that written interrogatories be used unless Rath agreed to pay half the deposition expenses. The ruling further stated that if Rath assumed the expense in question, the deposition costs would be assessed in the Court's final decision. This testimony was finally obtained by tape recording followed by partially successful transcription.

19. Following further discovery bearing upon relief, the matter was referred on July 8, 1982, pursuant to the Court's findings and this Order:

> "It is accordingly ordered that A. V. Hass, 820 North 8th Street, Chariton, Iowa, 50049, be, and is hereby appointed as Special Master in this case in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure, and this cause is referred to him as Special Master to make a preliminary investigation as to the facts relating to the appropriate remedy or remedies to be awarded herein; hear the witness testimony and examine the statistical and other documentary evidence to be presented at the hearing on the relief phase of the above-mentioned action; determine plaintiff's entitlement to the various forms of relief requested; perform the detailed computations necessary to determine the amount of backpay, an appropriate hiring quota and retroactive seniority, in the event plaintiff is deemed to be entitled to such forms of relief; and to compile and submit to the Court a Report and Recommendation setting forth his Findings of Fact and Conclusions of Law in regard to the foregoing."

20. There followed further discovery, an initial conference with Counsel for EEOC and Rath and the establishment of a tentative schedule. The attorney for the Union was invited on August 18, 1982, to attend that conference but declined verbally. He confirmed the Union's position in this respect by letter dated August 27, 1982, addressed to the Special Master and reading in part as follows:

> "For the foregoing reasons, the Union takes a neutral position, as it applies to remedies. The Union does not support nor encourage, nor sanction any type of discrimination. We therefore will not participate in the remedy resolution before you."

21. On October 27, 1982, EEOC asked the Court to make clear whether by its Order dated April 22, 1981, general population statistics for Louisa County were appropriate to rely upon in determining if Rath's hiring practices adversely impacted against females. It was EEOC's position in its request that should Louisa County work force statistics be used to determine the number of females Rath should have hired, it was the general work force that was involved because of the unskilled nature of the job openings. In its Order entered on December 3, 1982, after giving its reasons the Court ruled that general work force statistics had no probative value in determining whether Rath's hiring practices adversely impacted against women applicants.

22. Evidentiary hearing on the remedial aspects of the case was held on April 27 and 28, 1983, and was attended by counsel for EEOC and Rath. EEOC's motion to exclude evidence filed on September 25, 1981, with respect to lack of job qualifications of any female applicant

who was not hired after January 1, 1973, and which the Court treated as a motion in limine by its October 9, 1981, Order was not renewed at the relief hearing. However, no evidence was presented concerning the ability of any particular applicant so no ruling need be made sustaining or overruling the motion at this time.

23. Rath's objections to Plaintiff's Exhibits 1, 2, 3, 4, 6, 7, 8, 12, 13, 14, 15, 16 and 17 should be overruled. It made no objection to Plaintiff's Exhibits 9, 10 and 11. Its objection to Plaintiff's Exhibit 5 and plaintiff's offer of proof in connection therewith to show increased damages based upon census data should be sustained.

24. EEOC's objection of irrelevancy to Defendant's Exhibits AA through PPP because Rath's financial circumstances are no defense to an award of backpay should be overruled. While those exhibits do not constitute a defense to the award generally considered proper in employment discrimination cases they are relevant to a proper exercise of the discretion allowed in formulating a suitable plan of relief.

25. Additional briefing followed the conclusion of the relief hearing and now the Special Master adds to the background materials in the Preliminary Statement the following additional:

FINDINGS OF FACT

26. The class presumptively entitled to relief is composed of (a) the unhired females who applied for work at Rath's Columbus Junction plant after January 1, 1973, but before August 1, 1973, and (b) the unhired females, not spouses of Rath's employees, who applied for work at the Columbus Junction plant between August 1, 1973,

and December 31, 1980. Since violations outside the period of limitations can affect the measurement of an award and discrimination in hiring continued after February 15, 1978, the appropriate period for class membership begins in 1973 and continues through 1980. *Thompson v. Sawyer*, 678 F.2d 257 (DC Cir 1982).

27. It was not established at either the liability or relief stage of the trial that special qualifications were required for entry level production jobs. Those individuals applying for work during the appropriate period were actually seeking employment. Lack of interest in employment by particular females which Rath Claims should be recognized in arriving at the applicant pool was not shown at the liability stage and was not specifically pointed out with respect to any applicant during the hearing on relief. It is true that some of the applicants' depositions relate that they no longer wanted work at Rath on the dates the depositions were taken. However, if defendant expects the applicant pool to be altered by this testimony it must go further and show at what exact time the lack of interest surfaced and then persisted. A female who applied for work in 1974, for example, and who said on tape in 1982 that she was no longer seeking a job at Rath cannot be construed to show that she would not have gone to work if called during the appropriate period.

28. There is agreement disclosed on the briefs that if packpay is awarded it should be on a class-wide basis. (Plaintiff's Briefs filed May 22, 1981, and August 22, 1983; Rath's Briefs filed August 7, 1981, and September 10, 1982.)

29. There is agreement also that the formula proposed in *Hameed v. International Association of Iron Work-*

ers, 637 F.2d 506 (8 Cir 1980) should be adopted for computation of backpay, if allowed, subject to a modification which substitutes the average wages of all male hires instead of random samples selected from among them. (Defendant's Brief served September 10, 1982, and Plaintiff's Proposed Findings filed May 13, 1983.) The modified formula agreed upon is acceptable.

30. Employment applications submitted by those who were not hired remained on file (except those destroyed by Rath in 1979). These were considered along with new applications by Rath's hiring officer at Columbus Junction when a vacancy was filled. His choice was seldom disturbed. (Plaintiff's Exhibit 10, p. 37, liability stage.) Thus the applicant pool at any given time included carried over applications of both males and females. It contained rightly those females who had lost interest in Rath employment at the times of their depositions. *Tidwell v. American Oil,* 4 EPD 7544 (DC Utah 1971); *Slack v. Havens,* 8 EPD 9492 (SD Ca. 1973) and Paragraph 27 above.

31. Since a mathematically certain result is seldom obtainable, *Stewart v. General Motors Corporation,* 542 F.2d 445, 452 (8 Cir 1980), and the process of recreating the past involves imprecision and estimation, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 372 (1977), rounding upward or downward to the nearest whole number as proposed by the Plaintiff is approved in utilizing the modified *Hameed* formula.

32. The complaint or charge giving rise to the present litigation was filed with EEOC by Mary Turner on December 15, 1975. Rath has not argued its affirmative defense that section 614.1(8), Code of Iowa, 1979, bars wage

claims accruing more than two years prior to the filing of this action on September 1, 1977. That affirmative defense is considered abandoned. Allowable backpay is limited to the period beginning two years before December 15, 1975, it being assumed that February 7, 1976, as the filing date of the charge was mistakenly set out in the brief filed by EEOC on May 22, 1981. Rath's liability, however, may be based upon acts outside the two year period last mentioned where its current violation of Title VII is shown. *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1309 (5 Cir 1980), and *Thompson v. Sawyer*, supra, at 291.

33. Wages paid to hired male employees are summarized in Plaintiff's Exhibit 4 (relief stage), Tables 1-9, Appendix 3a at each table. In addition, those male employees received fringe benefits after a temporary period of hire. These consisted of life, health, accidental death and dismemberment insurance as well as dental, vision and prescription reimbursements. Even though the last three were on a claims-made basis, the benefits were Rath's expense in addition to hourly pay. An ordinary employee would hardly reject them and, therefore, they should be considered a part of females' lost wages. *Hameed*, supra, p. 521. The cost to Rath of the various benefits described for employees and their dependents, where the latter coverage was elected by the employee, is shown in Plaintiff's Exhibit 4, supra. It varied from a monthly expense of $31.57 in January, 1973, to $86.18 in March, 1981. (Plaintiff's Exhibit 7 (relief stage).)

34. All male employees hired did not continue in employment during the entire relevant period. If they did, their tenure had to be concluded with the Order entered

on April 22, 1981. For example, as shown by Plaintiff's Exhibit 8 (relief stage), the average tenure of a male hired in 1973 was 39 months, in 1974 it was 36 months, in 1975 it was 30 months, in 1976 it was 16 months, in 1977 it was 29 months, in 1979 it was 14 months and in 1980 it was 6 months. While there is authority compiled recently by the Bureau of Labor Statistics of the U.S. Department of Labor to show that the typical job tenure of women is approximately 75% of that of men, there is apparent agreement that tenure is equal for this determination.

35. For those females who applied for work but were not hired the average earnings, including benefits for each calendar period involved during established tenure, are those disclosed by Plaintiff's Exhibit 4 (relief stage), Tables 1-9, Appendix 4 at each table, and summarized hereafter in Paragraph 37. A review of the depositions of those not hired discloses some discrepancies in the gross earnings of unhired females unless wages only were considered to arrive at averages. For example, Ethel Devore testified that she had wage income of $1187 and commissions fo $2385 from insurance sales in 1979 but her wage summary, Plaintiff's Exhibit 1, shows only $1187 as a basis for computing the average 1979 earnings of unhired females. In 1980, her income from insurance sales, $2631, was also omitted from Plaintiff's Exhibit 1. Authoritative allowance for imprecision would appear to cover all such discrepancies.

36. The following figures are found to be established by the evidence introduced at the relief stage of the trial:

Year	A Total Applicants	B Female Applicants	C Female Percent	D Filled Openings	E Available Female Number	F Hired Females	G Females Denied
1973	112	36	32%	52	17	2	15
1974	211	51	24%	52	12	4	8
1975	233	57	24%	25	6	0	6
1976	328	77	23%	40	9	1	8
1977	366	83	23%	21	5	0	5
1978	0	0	0	0	0	0	0
1979	529	135	26%	92	24	9	15
1980	754	204	27%	44	12	6	6

NOTE: Column C equals B divided by A

Column E equals D times C

Column G equals E minus F

1978 excluded because only one male position filled

37. The wages and benefits received during the relevant period by male employees and unhired female applicants during their respective tenures are found to be the following:

Year	A Total Male Earnings	B Males Hired	C Average Earnings Hired Males	D Average Earnings Unhired Females	E Excess Hired Male Earnings	F Female Hires Denied	G Females' Lost Earnings
1973	$1,739,587	50	$34,792	$ 8,699	$26,093	15	$391,395
1974	$1,384,035	47	$29,448	$12,106	$17,342	8	$138,736
1975	$ 565,094	25	$22,604	$10,627	$11,977	6	$ 71,862
1976	$ 661,229	39	$16,955	$ 5,953	$11,002	8	$ 88,016
1977	$ 475,070	20	$23,754	$12,818	$10,936	5	$ 54,680
1978	0	0	0	0	0	0	0
1979	$1,821,545	83	$21,946	$ 7,418	$14,528	15	$217,920
1980	$ 449,045	38	$11,817	$ 2,935	$ 8,882	6	$ 53,292
TOTAL LOST FEMALE EARNINGS							$ 1,015,901

NOTE - Column C equals A divided by B
Column D is from Plaintiff's Exhibit 4, Tables 1-9
Column E is C minus D
Column F is from Column G, preceding summary
Column G is E times F
1978 excluded because only one male hired

38. The record is undisputed that the meat packing industry in which the Rath was engaged at Columbus Junction has been a troubled one for a number of years. (TR p. 77; Defendant's Exhibits LLL and UU, p. 20). Rath, being pork-oriented, has undergone its most troubled times during the past twelve months although its accountants have entertained serious questions concerning its ability to survive since 1975. Some of the matters justifying the accountants' concerns in this area are related as follows:

38.1 There has been no dividend for the stockholders since 1961.

38.2 In 1967, the banks from which it had been obtaining operating funds withdrew so it had to resort to commercial finance sources for those funds. (TR 119). Although there were subsequent changes in the source, it will be referred to hereafter as "Security".

38.3 Since 1972, it has had no cash of its own except for a brief period in 1980. (TR 121).

38.4 The financial stress was so severe that Security demanded and obtained a second lien in 1975 upon a certificate of deposit held in trust to secure Rath's payments for livestock purchased as required by the Packers and Stockyards Act. (Defendant's Exhibit CC). To satisfy the Department of Agriculture and the defendant's insurer, the latter demanding full collateral for its potential liability, Rath had to borrow $1,185,000 at 15% interest, convert it to a certificate of deposit bearing 8½% interest and deposit it in trust. (TR 125-127).

38.5 Running up against its credit limit in 1975, it sold most of its feed division, thereby obtaining $3,500,000 in cash which was added to its operating funds. (TR 122-123; Defendant's Exhibit GG, p. 3).

38.6 In 1975, it was unable to pay its contribution to its pension plan for hourly-paid employees for the 1974 plan year amounting to $3,900,000. (TR 129). The necessary money was obtained by arranging a secured loan on or about March 10, 1976, in the amount of $6,000,000 at 2-1/2% interest over prime from several banks which was 90% guaranteed by Economic Development Administration. (Defendant's Exhibit DD, TR 128-130). The present unpaid balance, $857,000, could not be met when it fell due on March 1, 1983, so Rath obtained a 60-day extension and was trying for another when the relief hearing was being conducted. (TR 130-131).

38.7 In 1976, Security gave notice to the Defendant that its financing agreement would be ended in 60 days because some of the participating banks were disturbed about Rath's condition. This notice was withdrawn after a conference. (TR 132-134).

38.8 Rath was without funds required for its contribution to pension plans for the plan years 1975 and 1976 but reached an agreement with the union to amortize those payments over a forty-year period. (TR 136).

38.9 In June, 1978, it reached the borrowing limit imposed by Security so closed its Columbus Junction operation until September, 1979, thereby improving its cash flow position by about $2,000,000. (TR 135). During this time, the employees gave up another estimated $2,000,000 in incentive payments to assist Rath in continuing as a viable entity. (TR 307-308).

38.10 For the 1977 pension plan year, it sought and obtained a waiver from Internal Revenue Service as a hardship case with prospect of recovery. It represented in its undated application, Defendant's Exhibit GG 2,

p. 11, that its current assets exceeded liabilities by $9,000,000, but reported also that it only had $115,000 cash on June 3, 1978. (Defendant's Exhibit GG 1, p. 1).

38.11 In the fall of 1978, at a time when the local union felt that concessions being requested by management would only save the company for 4 or 5 months (TR 303-307), it was faced with closure of its main plant at Waterloo, Iowa. Its salvation this time was a UDAG Grant of $3,000,000 to Blackhawk County Development Committee which was passed on as a loan to Rath at 6% interest on October 17, 1978. (Defendant's Exhibit II; TR 137-138).

38.12 To satisfy the Iowa Insurance Department that it should be allowed to continue as a self-insurer of Workers' Compensation Benefits, it borrowed $500,000 and placed it in trust with the accruing interest. (Defendant's Exhibit HH). This deposit is now approximately $800,000, but the cost to Rath by way of interest and compensation payments is less than the premium cost if it could locate an insurer willing to accept the worker's compensation risk. (TR 139-141; 215).

38.13 In April of 1979, the membership of Rath's local union agreed to partial deferrals of benefits for vacation, holiday and sickpay into an escrow fund. This saved $5,709,000 for the defendant in fiscal year 1980, $3,173,000 during prior years and $5,409,000 in fiscal year 1981. (Defendant's Exhibit WW, p. 10). Employees also deferred 50¢ per hour in wages then to help Rath's cash problems and began in July, 1980, to buy 1,800,000 shares of its unissued common stock. Those participating employees allowed $20 weekly to be withheld from wages for application toward the purchase price of $2.00 per share. (Defendant's Exhibit NN, p. 9). This stock purchase was

completed through withholding in this manner in June, 1982 (TR 314), and the employees now own 60% of the defendant's outstanding common stock.

38.14 On October 7, 1979, Roth sought waiver from Internal Revenue Service of its required contribution for its 1978 pension plan year. It represented in its application that its cash on June 2, 1979, was $114,000 and that its current assets exceeded current liabilities by $5,169,000. It also disclosed, as related by defendant's officers at the relief hearing, that the corporation was on a COD basis with its major suppliers. (Defendant's Exhibit OO).

38.15 The City of Waterloo, Iowa, applied in 1979 for a grant of $4,500,000 from HUD to lend to Rath for plant improvements. The required matching funds came from the employees' deferrals in the future. (TR 313). The agreement to purchase common stock was also a part of the deal as was an extension of the time of payment of the loan previously made to Rath by Blackhawk County Development Committee. The transaction which was closed on August 1, 1980, as shown by Defendant's Exhibit RR provided for 3% interest with the first quarterly principal payment to be made on September 30, 1983. This was a joint community and employee effort.

38.16 Unable to make its contribution for the pension plan year 1980, TR 151-153, it applied again to Internal Revenue Service for a waiver per Defendant's Exhibit UU and the waiver was granted. Rath represented then that its current cash assets exceeded current liabilities by $12,331,000.

38.17 It was able to negotiate a seasonal increase in its debt limit from Security on December 21, 1981, until January 15, 1982. (Defendant's Exhibit VV).

38.18 It realized once more in the summer of 1982 that it could not meet its contribution for the 1981 pension plan year coming due in September 1982, so it prepared Defendant's Exhibit CCC. This was used to show Pension Benefit Guaranty Corporation that there would be practically nothing for Defendant's unsecured creditors in the event of liquidation and that settlement of its pension liabilities was preferable to reorganization. (TR 158-159).

38.19 Both the local and international unions agreed then in September, 1982, that the pension plans could be terminated. (TR 159; Defendant's Exhibits YY and ZZ). The labor contract then expiring was extended to August, 1985, and the existing deferrals of benefits were continued. In addition, its employees deferred payment of $20 weekly in wages and those were frozen for a period of three years. This deferment of wages was not in addition to, but was a substitute for, the withholding previously authorized by the employees for the purchase of stock. (TR 319-320).

38.20 It applied to Internal Revenue Service, Defendant's Exhibit DDD, on August 6, 1982, for modification of the waiver for the 1980 pension plan year and for waivers of its contributions for the 1981 and 1982 pension plan years. (TR 163). It represented then that current assets exceeded current liabilities by $3,686,000 and that it had $183,000 cash but that if required to make the payments it would be forced to seek protection in an insolvency reorganization. The same representation was made to Pension Benefit Guaranty Corporation. (TR 164). The company was, in fact, bankrupt in the opinion of its chief executive officer. (TR 323). It gave notice to Pension Benefit Guaranty Corporation on September 3, 1982, that it intended to terminate its pension plans.

38.21 Security's credit limitation was increased from $14,000,000 to $20,000,000 on October 25, 1982, so that Rath would have funds with which to make seasonal purchases and could show survival prospects if the pension plans were terminated. The increase was to expire on March 1, 1983. (TR 162; Defendant's Exhibit BBB).

38.22 Pension Benefit Guaranty Corporation allowed Rath to end the pension plans by Defendant's Exhibit EEE dated December 1, 1982. On its books, Rath had carried $44,000,000 as its liability for those plans. To eliminate this, it paid $781,313 advanced by three banks and Security on September 14, 1982, agreed to pay $1,069,931 plus 12% interest from September 15, 1982, and gave its note for $5,846,447. The first payment on this note due September 15, 1983, is $1,705,716 plus 12% interest from September 15, 1982. Subsequent amortizing payments of $793,359 are to be made quarterly beginning on February 15, 1985, and ending on February 15, 1997.

38.23 Rath's financial squeeze continued to be acute so it closed its Columbus Junction facility on January 24, 1983. (TR 172). It remained in this status on the hearing date, TR 180, and the reopening, if it occurs, will not occur before the fall of 1983. Rath's discriminatory hiring was confined to this plant.

38.24 Rath's local union, realizing the gravity of its predicament, agreed to defer wages by $2.50 per hour for ten months beginning on February 22, 1983. (TR 175-176; Defendant's Exhibits KKK and LLL). This generosity resulted in savings for Rath but also in the filing of an unfair labor practice by the international union. (TR 189).

38.25 To reduce its credit line to $16,500,000 as required by Security, it shut down beef operations at

Waterloo, obtained earlier payment of government invoices and reduced its payroll costs by taking a strike at its Indianapolis plant. (TR 179-180). It had to pledge to Security its trademarks, its remaining unencumbered asset which Rath had always intended to preserve free of liens, to get the temporary increase of Security's credit limit to $20,000,000 and to obtain extensions of time for paying outstanding loans. (Defendant's Exhibit OOO; TR 181, 329).

38.26 Future profits, if any, are pledged as well. 50% goes to a profit-sharing fund to repay employees' deferrals, 5% to Blackhawk County Development Committee, and 15% of first $5,000,000, 20% of next $5,000,000 and 25% of all above $10,000,000 to Pension Benefit Guaranty Corporation. (TR 191).

38.27 It is estimated by Rath's accountants that if all operations were to be discontinued, severance pay as of October 2, 1982, would have been about $30,000,000. (Defendant's Exhibit JJJ). It is understood from its balance sheet as of that date, Defendant's Exhibit GGG, that this does not appear as a liability.

38.28 The following schedule will show the financial results for the fiscal periods indicated:

Period	Profit or (Loss)	Stkhldrs Equity	Def Ex
10–01–77	($1,018,000)	$6,860,000	EE
9–30–78	($6,441,000)	$ 419,000	JJ
9–29–79	($1,485,000)	($1,066,000)	PP
9–27–80	$3,348,000[1]	$2,674,000[2]	SS
10–03–81	($9,582,000)	($5,172,000)	WW
10–02–82	($6,492,000)	$16,886,000[2]	GGG
1–01–83	($2,989,000)	$13,897,000[3]	III
4–02–83	($3,622,000)	$10,275,000[3]	TR 183

1. Results in part from extraordinary credit of $3,173,000 for deferrals by employees.

2. Results in part from extraordinary credit of $28,160,000 from pension liability settlement.

3. All periods are for fiscal years ending on dates shown except these are for three months.

INJUNCTION

39. Achieving a remedy that is fair and workable and, for that purpose, analyzing the competing interests a pertinent fact is that Rath's plant where discrimination was adjudicated in 1981 has been closed since January 24, 1983, because of inadequate operating cash. (TR 108). Whatever is determined as appropriate in hiring certainly faces future uncertainties and must defer to activity at the Columbus Junction plant. One part of the remedy concerning which there is no disagreement, however, is that injunctive relief is proper. It is the scope of that restraint which brings differences between the parties.

40. EEOC advocates that within 30 days after entry of the Order for relief Rath should submit proposed selection procedures which are designed to meet the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607.1 to 17, with the Court thereafter to resolve any differences arising on the subject. Plaintiff would then impose upon Rath a duty to complete a study at the end of one year and provide EEOC with a copy to verify that its selection criteria have been operating in conformity with the Uniform Guidelines. If at any time during the five year period that it would have the Court retain jurisdiction EEOC believes that Rath's selection procedures are faulty and the latter disagrees with that belief the differences again are to be brought to the Court's atten-

tion for resolution. Plaintiff would require Rath to keep extensive records, provide copies thereof periodically to EEOC and give it access thereto at any reasonable time after written notice.

41. In view of the facts that the Court should retain jurisdiction for supervisory purposes, that Rath has never been subjected to a demonstration of good faith in hiring under an injunction prohibiting discrimination based upon sex, that future operations at Columbus Junction are not a certainty, that giving preference to females still interested in working there will consume a long period of time after any resumption of operations and that the record at the liability stage of the trial disclosed that there were no particular qualifications for jobs which can be generally handled by either sex it is believed that the relief proposed by EEOC is unnecessarily complex and burdensome.

42. Rath's good faith in hiring females can be measured after re-opening at Columbus Junction, if it occurs, while the list of female applicants still interested in work there is being depleted. Since jurisdiction should be retained, Rath's demeanor toward female employment can be monitored during that period of time and can result in strictures, if then appropriate, which are more closely related to those now espoused by EEOC. If Rath does not re-open at Columbus Junction, then the extensive burden associated with the mandatory relief sought by EEOC can be avoided.

BACKPAY

43. Historically, it was said in *Wells v. Meyers Bakery*, 581 F.2d 1268, 1272 (8 Cir 1972) that backpay is a fundamental remedy deniable only in extraordinary cir-

cumstances. In *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5 Cir 1974), the Court advised that

> "the special factors which would prevent a backpay award have been narrowly construed and usually include only circumstances where state legislation is in conflict with Title VII."

44. Later, the Supreme Court decided *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), remarking for guidance that backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of (1) eradicating discrimination throughout the economy and (2) making persons whole for injuries suffered through past discrimination. While this decision would seem generally, as a practical matter, to foreclose denial of backpay we are told later in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 375 (1977) that the district court must look to the practical realities and necessities involved in reconciling competing interests so that it may find that special blend of what is fair and what is workable. It advised that perhaps relevant to the decision are the number of victims, the number of nonvictim employees affected, the alternatives available to them and the economic circumstances of the industry. Later, as if to leave some room for the district court's discretion we are told in *City of Los Angeles v. Manhart*, 435 U.S. 705 (1978), 98 S.Ct. 1370 at 1378, that the presumption in favor of backpay:

> "can seldom be overcome but it does not make meaningless the district court's duty to determine that it is appropriate."

45. EEOC believes that the economic circumstances of Rath are not relevant to the backpay issue but that

position cannot be rightly sustained. The complete circumstances facing the parties must be made clear before the district court can fashion a remedy that is fair, workable and not an abuse of its discretion. EEOC, in fact, recognizes this by suggesting that it does not object to installment satisfaction of an award. (Plaintiff's Reply Brief filed September 23, 1982, p. 4).

46. Appealing to the court's equitable powers, Rath presents as militating against an award of backpay (1) its precarious financial straits and ongoing losses, (2) its 60% ownership by employees and (3) its stated inability to liquidate an award unless the employees make further concessions. The Special Master believes that these conditions, as they appear in the record, are not of sufficient weight or so "exceptional" that they overcome the presumption that backpay, if a loss is proven, is generally one of the consequences of Title VII violations.

47. With respect to (1) above, Rath has been in financial jeopardy since 1975, at least, and still shows substantial operating losses that are mostly in cash. However, its employed persons have received compensation from Rath to the exclusion of the female discriminatees during all the time that the employer's losses are shown to have occurred. The benefits of the employment contract enjoyed by the workers have been responsible, in part, for draining Rath's resources while the applying females entitled and able to work were excluded from joining in the draining process.

48. With respect to (2) last mentioned, that argument is discounted by *Pettway v. American Cast Iron Pipe Co.*, supra, 253, and with respect to (3) last mentioned, the present employees made their stock purchases when they must have been aware that this litigation was

in process as a potential liability. In addition, those stockholders through policies of their elected Board of Directors have continued to discriminate against female employment. There appears little reason, therefore, for excluding the discriminatees from sharing in any stockholders' equity Rath may have since it has been generated somewhat by the beneficence of the Pension Benefit Guaranty Corporation in 1982. This result is a proper step toward fulfilling one of the central purposes set out in *Albemarle*, supra. The statement made in *Rios v. Local 638, et al.*, 400 F. Supp. 988 (S.D.N.Y. 1975) at page 991, to-wit:

> "In making awards for backpay, all the circumstances of the case, including ability to pay, must be taken into account",

as set out on page 14 of Rath's Post Trial Brief on Remedy antedated *Albemarle* and must be read now with the latter decision. Those who have had jobs while Columbus Junction was open to them have fared better than the unhired females even though the former have made and continue to make sacrifices to preserve Rath but also their individual employment. If, as asserted by Rath's management, it should eventuate that the employees must be asked to make further concessions to right a wrong in which they participated and from which they have benefited there is nothing inequitable in the necessity for that request. Actually, males are not the only ones who will have to contribute if the employees should be the only source to which management can turn.

49. Rath argues, however, that EEOC's computations are at fault because the Order entered on April 22, 1981, found discrimination established at Columbus Junction only between January 1, 1973, and February 15, 1978, and the latter date is not fixed as the terminal cutoff for

ascertaining lost earnings. EEOC does not read the Order in that light and it is not for the Special Master to construe it to resolve those arguments. However, had the district court intended to limit class-wide backpay to those females who applied for work prior to February 15, 1978, it surely would not have sanctioned, at EEOC's instance, publication of an advertisement designed to locate females who had applied for work during August, September and October, 1979. (Ruling September 2, 1981). It is noted additionally that in this case begun in 1977 which reached trial in July, 1980, and was decided initially in April, 1981, it would be almost impossible for plaintiff to continue discovery so that it might present discriminatory statistics which were current at the trial dates. Recognizing those realities, the following comments were made in *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1309 (5 Cir 1980):

> "Of course, backpay relief under Title VII is limited to the two years preceding the filing of a charge with the EEOC. 42 U.S.C. section 2000e-5(g). However, liability of the employer for backpay may be based on acts occurring outside the two year period if a current violation is shown. *Miller v. Miami Prefabricators, Inc.*, 438 F. Supp. 176, 178-180 (S.D. Fla. 1977); see also *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5 Cir 1974)."

Reference is made also to *EEOC v. Enterprise Association, etc.*, 542 F.2d 579 (C.A.N.Y. 1976).

50. If there is to be some adherence to the suggestions made in *Stewart v. General Motors Corporation*, 543 F.2d 445, 454, (7 Cir 1976), for arriving at backpay, a significant determinant is the length of the period during which discrimination occurred between the filed charge

and the decree finding liability. Since we are concerned here only with a failure to hire, the appropriate period with allowance for tenure can begin in 1973 and end on April 22, 1981. If front pay which is allowable in several districts is a recognized form of relief which could be proper here but is not requested, then fixing the end of the appropriate period and class membership as the date of the April 22, 1981, Memorandum and Order finding discrimination is not unfair to Rath. It has pointed out no glaring errors in EEOC's calculations. It is uncritical of them except with respect to interest and the use of hiring statistics for the full year of 1973 and after February 15, 1978. As pointed out elsewhere, there are some minor discrepancies observable between the earnings disclosed in the depositions of some unhired females and tabulation thereof by EEOC. However, the inaccuracies are within limits and do not fault seriously the total award of $1,015,901 which the Special Master approves as based upon established facts.

HIRING QUOTA

51. EEOC originally proposed as part of the relief a hiring regimen at Columbus Junction of one female to one male until the female percentage of employees there is equal to the percentage of females in the local labor force. (Plaintiff's Proposed Findings of Fact and Conclusions of Law filed May 13, 1983). Rath contends that any such proposal is premature, extreme and a possible violation of 42 U.S.C. section 2000 (e)-2(j). It also claims that it is at odds with the evidence in that, because of the natural female dislike for some of the jobs offered at a meat processing facility, it was not shown that such percentage was ever a predictable occurrence. It asserts also that the proposal is contrary to the Court's Order

entered on December 3, 1982. (Defendant's Post Trial Brief on Remedy, pp. 5-8). In EEOC's Reply Brief filed on June 20, 1983, it retreats, in part, from its original position and advocates an ultimate percentage of female employees equal to the ratio of female applicants to total applicants from 1973 through 1980.

52. The use of hiring quotas is generally recognized as an appropriate means of eliminating past discrimination. *Carter v. Gallagher,* 452 F.2d 315 (8 Cir 1971) and *U. S. v. N. L. Industries,* 479 F.2d 354 (8 Cir 1972). According to defendant's records and Plaintiff's Exhibit 4, Tables 1-9 (relief stage), roughly one female applied for work at Columbus Junction as four males were applying during 1973 through 1980. There is no sound reason why a sincere effort should not be made to attain ultimately that ratio in employment upon re-opening, if it occurs. Where the hiring requirement is reasonable and temporary in nature, there is no encroachment upon 42 U.S.C. section 2000(e)-2(j). *U. S. v. N. L. Industries,* supra. As expressed in *U. S. v. City of Miami, Florida,* 614 F.2d 1332, 1335 (5 Cir 1980):

> "At this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effect of past discrimination."

To restore or attain a proper balance and thus offset past discrimination based upon sex in hiring, a quota is proper.

RETROACTIVE SENIORITY

53. Rath opposes strenuously the concept of retroactive seniority for unhired female applicants who may be employed later after having been victims of Title VII

discrimination. It argues that it is unfair to employees who have worked to obtain their status, that it will be demoralizing and that it will produce labor-management problems because of the undesirable nature of some of the jobs in the plant. It notes some of the fears expressed in *Meadows v. Ford Motor Company,* 510 F.2d 939, 949 (6 Cir 1975) and is particularly opposed to constructive competitive seniority. However, as related in *Franks v. Bowman Transportation Company,* 424 U.S. 775, 96 S. Ct. 1251, 1269 (1976) these same fears have not caused imponderable difficulties in cases arising under the National Labor Relations Act where retroactive seniority as part of the relief for discrimination is the general rule. *Franks,* supra, holds that such seniority cannot be denied simply because the interests of other employees may be affected.

54. That decision quotes with approval the following parenthetical language in *U. S. v. Bethlehem Steel Corporation,* 446 F.2d 652, 663 (2 Cir 1971):

> "Assuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification . . . . (If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.")

It also creates a presumption in favor of granting constructive seniority and says in f.n. 34 that there must be persuasive justification for treating Title VII violations differently. That its imposition is not an illegal preference because of sex, see *Acha v. Beame,* 531 F.2d 648,

656 (2 Cir 1976). Under the record made here which only describes time lost due to training a new employee, male or female, a delay in maximum productivity until training is completed and an undefined effect on the relationship of the workers - the presumption in favor of retroactive seniority is not overcome.

INTEREST

55. The Special Master has been cited to no case and has found no authority which holds that there is a presumption in favor of prejudgment interest in the event of a Title VII violation and award. Generally, where a claim is unliquidated the allowance of such interest is discretionary. *Thomas v. Duralite Co.*, 524 F.2d 577 (3 Cir 1975). This seems to be the rule for Title VII cases. *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 787 (7 Cir 1979); *Washington v. Kroger Co.*, 671 F.2d 1072, 1078 (8 Cir 1982) and *Whatley v. Skaggs Companies, Inc.*, 704 F.2d 1129, 1140 (10 Cir 1983). In *Board of Commissioners v. United States*, 308 U.S. 343, 352 (1943), we read the following:

> "Interest is denied where its exaction would be inequitable."

In *Lodges 743 and 1746, etc. v. United Aircraft Corporation*, 534 F.2d 422, 445-7 (2 Cir 1975), this statement appears:

> "Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts . . . . . In suits for breaches of labor agreements, as in other cases, a vital ingredient in the determination whether to award prejudgment interest is a desire to make whole the party injured

by the breach, but in appropriate circumstances, compensatory principles must be tempered by an assessment of the equities."

56. One of the central purposes of Title VII is to make whole those who have undergone discrimination so, at first glance, it seems illogical to meditate over the disallowance of prejudgment interest where the propriety of a backpay award has once been determined. However, the duty of the district court is to attempt a remedy that gives weight to a reconciliation of the competing interests and facially, at least, brings about a result that is fair and workable. *Teamsters*, supra, 375.

57. As EEOC's calculations in Plaintiff's Exhibit 4 (relief stage) are observed, they appear at fault for computing interest on lost benefits and earnings prior to their being at hand at rates which probably no female employee could have reasonably obtained had she possessed the fund. Additionally, it appears that the interest has been compounded by EEOC unless the figures are read incorrectly. (TR 32-33). The original charge here was filed on December 15, 1975, and the Complaint in the case was not filed until September 1, 1977, so 20 months passed before steps were taken to fix Rath's responsibility. A year passed after the Order on April 22, 1981, before reference was made and another ten months passed between the reference and the relief hearing. It is not intended to place all the blame for delay upon EEOC by these remarks.

58. It is undisputed that the pork processing industry in general remains, in the past few years, highly unprofitable. Rath's financial status, in particular, is such, in the writer's opinion, that the added interest burden of $988,272 which EEOC seeks and which has accrued over ten years, if allowed, could well foreclose opening of the Columbus

Junction operation and bring about Rath's demise. This would be accompanied by a devastating loss of jobs and no employment benefit for those female applicants who still maintain an interest in working for it. The employees who sacrificed $20.00 weekly in wages to purchase Rath's stock at $2.00 per share but which was last quoted at a low of 50¢ per share in the fourth quarter of 1982 (Defendant's Exhibit GGG, p. 17), who have deferred fringe benefits valued roughly at $5,000,000 annually, who have recently given up $2.50 per hour in wages (TR 175-6; Defendant's Exhibits KKK and LLL) into a profit sharing fund that may never come to life and who own 60% of Rath's issued common stock should not be called upon to subordinate their stock of questionable value to prejudgment interest on the backpay award. None of the female class is called upon to contribute to the sacrifices she would have been required to make had she been hired so failure to provide prejudgment interest will equalize, to some extent, these differences.

59. Further, as it will be projected for payment in the future, it is felt that the award of backpay without interest before judgment will be within Rath's reach. It is determined also that the prejudgment interest sought when coupled with post-judgment interest thereon could well precipitate Rath's downfall. A remedy which creates the prospect of casualty for both Rath and the discriminatees who still prefer work at Columbus Junction is neither equitable nor the proper exercise of sound discretion so prejudgment interest should be disregarded.

COSTS

60. The briefs filed by the parties present their respective attitudes toward the assessment of costs. As the Order of Referral is understood, that is not a matter

upon which the Special Master is expected to make a recommendation. It would be inappropriate, in any event, since his interests are indirectly involved. Disposition of the costs, therefore, is not a part of this Report and Recommendation.

61. The Special Master recommends that the following be made a part of the DECREE to be entered:

IT IS THEREFORE ORDERED AND DECREED AS FOLLOWS:

A. That the word "defendant" herein is intended to describe and does describe The Rath Packing Company and its agents, officers and employees having direct or indirect responsibility for the operation of Rath's Columbus Junction plant and the hiring of employees at said location.

B. That the Court shall retain supervisory jurisdiction over this matter and its parties for a period of five years following the entry of the decree unless sooner terminated voluntarily by it or for cause shown. Any party shall have the right to request the Court's intervention for reasons shown upon timely notice to the other party or parties affected.

C. That during the period that the Court retains supervisory jurisdiction over the case and its parties, defendant shall maintain the following records referable to its Columbus Junction operation:

(1) All applications for employment;

(2) All employment tests, interview notes, reference checks and investigative reports on applicants;

(3) An applicant-flow log, kept separate from applications, showing the name of each applicant, the applicant's sex and the date of the application;

(4) All advertisements for the hiring of employees;

(5) All personnel files of employees working for defendant at any time during this period;

(6) All other documents which relate to defendant's procedures and criteria for new hires; and

(7) All documents which relate to the discharge of any female employee.

D. That the defendant is perpetually enjoined from engaging in any act or maintaining any policy that has the purpose or effect of discriminating, on the basis of sex, in the hiring of employees at its Columbus Junction facility, except as herein expressly authorized.

E. That the defendant, within 60 days after the entry of this decree or within 60 days after reopening its Columbus Junction plant, whichever is later, shall develop, file and serve upon the other parties objective selection procedures which it has adopted for the hiring of new employees there. Those procedures which shall not discriminate against prospective female applicants shall become effective only after the eligible females listed in Appendix A attached hereto have either been hired or have declined an offer of employment or have been found disqualified.

F. In the event plaintiff believes that defendant's selection procedures and criteria are not being followed by defendant or have need of amendment to carry out better the intent of this Decree at any time during the period the Court retains jurisdiction over this matter, the plaintiff shall notify the defendant in writing of the facts upon which it relies and request corrective measures. Within 30 days of the defendant's reply, the plaintiff shall notify the defendant in writing of either the plaintiff's accept-

ance of the defendant's position or the reason said position is unacceptable and, if applicable, any revised corrective measures. If the defendant does not take the action requested by the plaintiff within ten days after of the plaintiff's notification, the parties will submit their respective positions to the Court for resolution.

G. That nothing herein contained is intended to interfere with the orderly and preferential recall of those persons who were employed at Columbus Junction when it closed on January 24, 1983.

H. That after reopening its Columbus Junction plant and until those physically and mentally able females listed in Appendix A have been employed or have declined employment when offered, the defendant shall hire one qualified female production worker at said plant from among those listed in Appendix A for each male production worker hire there after said reopening. Offers to hire will be made in the order in which the names of females appear in Appendix A. An eligible female whose name appears in Appendix A and who accepts defendant's employment offer shall be granted seniority which will be retroactive for all purposes to the date upon which the first entry level job was filled by a male after the date upon which the female's first application for work at Columbus Junction was submitted to defendant.

I. When the names of those in Appendix A have been exhausted because of physical or mental disqualification, acceptance of employment or its refusal defendant shall thereafter hire not less than two females from among the female applicants then qualified under its adopted selection procedures for every three male production workers hired until the percentage of females is at least 25% of the production workforce at Columbus

Junction on or before the expiration of five years after the date hereof. That percentage, within reasonable limits, shall be maintained thereafter.

J. That judgment for the use of the class members shall be entered against The Rath Packing Company in favor of Equal Opportunity Employment Commission for the sum of $1,015,901 with interest thereon at the rate of 10% per annum from the date hereof. Said judgment and interest, unless otherwise settled, may be paid by the judgment debtor in five equal installments of principal together with accrued interest to date of payment, the first such installment with interest to mature on October 1, 1984, and subsequent installments with interest to mature annually thereafter. Failure to meet a required installment with interest will accelerate the unpaid balance in full together with the accruing interest at the option of the plaintiff.

K. That under the supervision of the Court, EEOC shall formulate a plan for disbursement of the judgment proceeds for the Court's approval, it shall give written notice to the members of the class entitled thereto that they must claim their respective share of said proceeds within 30 days after said notice given or forfeit her participation therein, shall attend to the proper distribution of said proceeds among class members and, upon their acceptance, obtain releases which will protect the defendant from further liability to a class member thus paid. No class member shall receive more than her actual loss of earnings plus post-judgment interest thereon.

L. That no female shall be knowingly retaliated against by defendant because of her participation in this litigation or any of its benefits.

M. That the petition should be dismissed as against the defendant District Local 431 Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO.

N. That the costs of he action should be paid by the parties in the following percentages: Plaintiff, ...%, and The Rath Packing Company, ...%.

Dated this 30th day of September, 1983.

/s/ A. V. Hass

A. V. Hass
Special Master
820 North 8th Street
Chariton, Iowa 50049
(515) 774-2414

APPENDIX D

(Filed April 22, 1981)

IN THE UNITED STATES DISTRIT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
vs.	)	Civil No. 77-57-D
THE RATH PACKING COMPANY, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

This is an action initiated by the Equal Employment Opportunity Commission (EEOC) against the Rath Packing Company (Rath) pursuant to Section 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) and (3), as amended, to redress alleged violations of section 703(a) of this title, 42 U.S.C. § 2000e-2(a). Jurisdiction is invoked under 28 U.S.C. §§ 451, 1343 and 1345. District Local 431 of the Amalgamated Meat Cutters and Butchers Workmen of North America, AFL-CIO (Union) the exclusive bargaining representative for plant employees at defendant's Columbus Junction facility, was also designated as a defendant in the complaint. In its Ruling and Order of September 12, 1979, the Court granted defendant Union's motion for a partial summary judgment on the issue of liability but held that the Union would be required to participate in a subsequent hearing on the relief to be

granted, if the company was found liable for the alleged Title VII violations.

The statutory administrative prerequisites have been satisfied and this Court has jurisdiction under the foregoing sections.

The question of liability was severed from that of damages and the case was tried on the liability issue alone beginning July 21, 1980. Briefing was concluded January 5, 1981 and the matter is presently before the Court for consideration. After a careful review of the pleadings in conjunction with the testimony of the witnesses, the exhibits and other evidence adduced at trial, the Court hereby enters the following ruling.

ISSUES

In its post-trial brief plaintiff identifies the following primary legal issues before the Court:

> 1. Whether the defendant at its Columbus Junction facility engaged in unlawful employment practices by failing to hire females because of their sex in violation of section 703(a) of Title VII? [42 U.S.C. § 2000e-2(a)]
>
> 2. Whether the defendant's policy against hiring spouses at its Columbus Junction facility has had and continues to have a discriminatory impact on females in violation of section 703(a) of Title VII?

Rath specifically calls the Court's attention to the fact that this case is not brought under section 707 of Title VII, 42 U.S.C. § 2000e-6 (patterns or practices actions). Plaintiff has not objected to this characterization of the lawsuit and it is within the legal issues stated above. The Court will therefore treat the action as so limited.

Rath Packing Company is an Iowa corporation engaged in the business of slaughtering hogs and processing pork products. Its principal slaughtering and processing operation is based in Waterloo, Iowa. A second more limited slaughtering and processing facility, located in Columbus Junction, Iowa, is the subject of the present litigation.

The Columbus Junction plant is divided into twelve departments: Hog Kill, Hog Cut, Loading, Sanitation, Trim, Inedible Rendering, Yards, Smoking and Curing, Packing, Maintenance and the Miscellaneous Gang. More than half of the job classifications for the period encompassing September 1, 1970 until August 31, 1979 were in the Kill and Cut departments.

EEOC contends that Rath engages in unlawful employment practices at the Columbus Junction plant through the maintenance of hiring policies and practices which function to deny equal employment opportunity to females based on sex. For the purpose of establishing a prima facie case of discrimination, plaintiff offered proof of subjective selection procedures, statistical evidence, individual instances of discrimination and expert testimony regarding the validity of defendant's no-spouse rule.

A Title VII complainant bears the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). At trial, the parties joined issue under both the disparate treatment and impact modes of analysis. In a disparate treatment case, the plaintiff must raise an inference of discriminatory intent, whereas proof of such intent is not mandated under the disparate impact rationale. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-336 n. 16 (1977); McDonnell Douglas v.

Green, 411 U.S. at 806; Griggs v. Duke Power Co., 401 U.S. 424, 430-432 (1971).

HIRING POLICIES AND PRACTICES

Rath has not established a procedure for giving public notice of job vacancies when they arise. Unless a particular vacancy is filled by promotion or transfer from within the company, Walter McFarland, the management official primarily responsible for the screening, interviewing and ultimate selection of applicants, is informed of the need for a new hire. At that point, Mr. McFarland draws upon an available applicant pool in making his selection. Mr. Slight, plant superintendent from 1961 until January 1980, and his successor, Mr. Tobias, reserved the right to overrule McFarland's choice of applicants, but have rarely done so.

Applicants are not chosen for specific vacancies, since new hires are placed wherever necessary within the plant during the first thirty days of their employment. Consequently, it is difficult to predict what function a new hire will eventually perform upon expiration of the thirty-day probationary period at the time of his or her initial selection.

The record shows that Rath is, and was at all pertinent times, required by the terms of the collective bargaining agreement to promote or transfer from within rather than to hire from outside. Any existing employment criteria are unwritten, and are left entirely to the discretion of Mr. McFarland.

At trial, Mr. McFarland was unable to identify with any degree of certainty what information he deems significant in evaluating applications, nor could he indicate what

factors prompt him to select some individuals for employment and to reject others. Height, weight and prior experience were discounted as essential prerequisites for hire, although Mr. McFarland did state that persons five feet eight inches or taller who weighed over 150 pounds would perhaps be more attractive employment prospects. McFarland noted, however, that shorter individuals received equal consideration, and that height, weight and previous work history were not particularly important factors in the hiring process. This is substantiated by the fact that a significant number of male applicants were selected notwithstanding their failure to satisfy at least one of the requirements.

DISPARATE IMPACT

Under a discriminatory impact theory, a civil rights complainant need not prove that the defendant's acts were predicated upon factors proscribed by Title VII. A violation may be found where the complainant proves that a facially neural employment policy or practice operates to impose a substantially disproportionate burden on a protected group. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Griggs v. Duke Power Co., 401 U.S. at 430-432. To overcome a prima facie showing of disparate impact, the employer has available a business necessity defense. In the event the employer proves that the disputed practice bears a "manifest relationship to the employment practice in question", Kirby v. Colony Furniture Co., Inc., 613 F. 2d 696, 703 (8th Cir. 1980), plaintiff may refute the employer's justifications with evidence that alternative, nondiscriminatory means of furthering these legitimate business purposes may be implemented. Dothard v. Rawlinson, 433 U.S. at 329.

When assessed in the aggregate, the impact of the selection procedure described above might well have been felt more severely by females seeking production line positions than males, by virtue of the absence of safeguards against sexual bias in the hiring process. Proof of a lack of objective hiring practices and job criteria, however, without further evidence of discriminatory conduct causally linked to such practices and criteria, does not give rise to a Title VII violation. Eubanks v. Pickens-Bond Construction Co., 635 F. 2d 1341 (8th Cir. 1980). Subjective employment criteria and hiring policies are evidence of discrimination only where buttressed by proof that their use results in a disparate effect on the protected group. Harper v. Trans World Airlines, Inc., 525 F. 2d 409 (8th Cir. 1975); Rogers v. International Paper Co., 510 F. 2d 1340, 1345 (8th Cir.), vacated and remanded on other grounds, 423 U.S. 809 (1975). The Court will therefore proceed to an assessment of EEOC's statistical evidence and description of instances of individual discrimination, in order to determine whether a prima facie case has been made.

A. *Statistical Evidence*

EEOC challenges defendant's hiring practices and policies under the discriminatory treatment and impact theories. Either form of analysis may be applied to the specific facts of this cause. See Kirby v. Colony Furniture Co., Inc., 613 F. 2d at 702. Accordingly, the Court will first evaluate the significance of plaintiff's statistical evidence under the less stringent impact doctrine. See Wright v. National Archives and Records Serv., 602 F. 2d 702, 711 n. 7 (4th Cir. 1979).

While a prima facie case may in some instances be premised on statistics alone, the Court may not place

undue reliance on this form of evidence, but must consider the surrounding facts and circumstances in their entirety. See International Brotherhood of Teamsters v. United States, 431 U.S. at 339-340; Heymann v. Tetra Plastics Corp., 640 F. 2d 115, 122 (8th Cir. 1981); Eubanks v. Pickens-Bond Construction Corp., 635 F. 2d at 1347. The "complexities and variables require close scrutiny of empirical proof." EEOC v. Eagle Iron Works, 424 F. Supp. 240, 246 (S.D. Ia. 1976).

Several different methodologies were employed by EEOC in attempting to prove hiring discrimination through statistical evidence. Initially, the agency relied on applicant flow data for the period extending from January 1, 1973 to February 15, 1978. Statistics stipulated to by the parties show that while a total of 557 individuals applied for employment during this period, only 164 were hired, 7 women and 157 men. The stipulation further indicates that of the 557 applicants 114 were women and that of this group, 26 were spouses of Rath employees.

Although it is logical to assume that some jobs in a packing plant would be less desirable to more women than men, the Court finds that there is no bona fide occupational qualification that would support a hiring decision based on gender. The defendant does not seriously urge this position.

After adjusting figures in the stipulation to exclude spousal applicants, such figures show that 95 women sought employment at Rath during the five-year period, while only 7 were hired. Employing a form of statistical analysis patterned on that approved by the Supreme Court in Hazelwood School District v. United States, 433 U.S. 299 (1977) and Castaneda v. Partida, 430 U.S. 402 (1977), the Court finds that plaintiff has successfully made out a

prima facie case of discriminatory impact based on its applicant flow data.[1] Particularly where coupled with proof of subjective hiring procedures, the applicant statistics presented by plaintiff indicate that sex is the sole identifiable factor explaining the divergence in numbers of men and women selected by Rath during the relevant time frame.

The agency next attempted to prove the proscribed discriminatory effect by comparing the percentage of female employees in Rath's labor pool to that of women employed in similar occupations in the relevant labor market, Louisa County, for the years 1971 and 1978. Since entry-level or unskilled positions are at issue, and the necessary qualifications are those that many persons possess or can readily acquire, general population or civilian work force data are appropriate. See International Brotherhood of Teamsters v. United States, 431 U.S. at 337 n. 17; Green v. Missouri Pacific Railroad Co., 523 F. 2d 1290, 1294 (8th Cir. 1975).

Definition of the available "qualified" labor pool is an element of the plaintiff's prima facie case, thus requiring plaintiff to produce evidence of skills possessed by persons in the pool. See Hazelwood School District v. United States, 433 U.S. at 308. Occupational data compiled by the Iowa Department of Job Services for the years 1970 and 1979 was introduced by EEOC for purposes of comparison with the number of women employed by Rath during the years 1971 and 1978.

On the totality of the evidence, the Court concludes that the disparity between the expected and observed values for the year 1971 alone is statistically significant.[2]

By way of contrast, plaintiff's failure to properly delineate the relevant job categories within the Louisa County labor market for the 1979 census year renders any com-

parison of Rath's actual work force to the percentage of female employees in that market impermissible. Census data for the year 1979, drawn from plaintiff's exhibit 23, does not provide a breakdown of the occupational classification "nontransport operatives", which includes two subclasses in addition to that of "nondurable goods manufacturing." According to plaintiff's Exhibit 25, only the latter subclass encompasses jobs substantially similar to those held by Rath employees.

Thus, as plaintiff itself acknowledges, only the nondurable goods component of the nontransport operatives classification may be utilized as a reliable foundation for comparison of Rath's work force and the available applicant pool in Louisa County. There was no effort on plaintiff's part to identify this crucial component in the context of 1979 census figures, or to show that workers whose employment falls within the subclasses of "durable goods manufacturing" or "nonmanufacturing industries" performed tasks comparable to those performed by Rath employees. For these reasons, plaintiff's census data for the year 1979 does not establish a prima facie case of discriminatory impact.

The remaining statistical analyses offered by plaintiff at trial are too biased to serve as evidence of its sex discrimination claim. Plaintiff endeavored to show a disparate impact by evaluating the utilization of women in Rath's work force in terms of the sexual composition of labor pools of seven Iowa pork slaughtering and processing plants, including Rath's Waterloo operation, and of employers engaged in the meat products industry in Iowa as well as nationally. A raw comparison of Rath's employment profile with those of the foregoing employers does not justify an inference of discrimination, for the

reason that plaintiff neglected to extirpate several analytic biases appearing in the record. Significantly, no expert testimony was introduced to lend greater importance to plaintiff's calculations and to attest to their credibility. See Eubanks v. Pickens-Bond Construction Co., 635 F. 2d at 1351; EEOC v. Eagle Iron Works, 424 F. Supp. at 246.

While both the Rath meat packing plants at Waterloo and Columbus Junction are involved in the slaughtering and processing of hogs, defendant demonstrated enough differences between the operations of the two facilities to render comparison suspect. Further, plaintiff's Exhibit 42 itself indicates that less than half of the active processing departments at Waterloo operate at Columbus Junction. In addition, Waterloo employs approximately 2,000 individuals, whereas only about 200 persons have held jobs at Columbus Junction during the years involved in this lawsuit, over 50% of them in the Kill and Cut departments, which are less attractive to women.

The Court therefore believes that the substantial disparity between the two samples, in terms of the type and volume of production and the number of active departments and employees, significantly detracts from the reliability of plaintiff's comparison, and thus destroys its statistical value.

Plaintiff's efforts to compare the Columbus Junction employment profile with samples comprised of labor pools of pork slaughtering facilities located in Iowa and throughout the nation are likewise entitled to little weight. The agency made no showing that Rath's job classifications, the size of its work force or the type and volume of its production are substantially similar to those of the meat

packing plants selected for comparison, nor will the Court engage in speculation in this regard.

Obviously, what the hiring figures of the employer prove is dependent upon the figures to which they are compared. See Hazelwood School District v. United States, 433 U.S. at 310. It is plaintiff's responsibility to produce a meaningful statistical comparison, which in this instance it has failed to do. See Miller v. Weber, 577 F. 2d 75, 77 (8th Cir. 1978). As was the case in the Waterloo example, potential deviations between Rath's operations and those of the various plants against which its labor pool was measured raise a serious question as to the relevance of the comparative studies under discussion. Hence, the Court cannot accept these analyses as persuasive evidence of a disparity in hiring.

In summary, the Court finds that plaintiff's statistical proof of Rath's failure to hire females in percentages commensurate with their representation in the applicant pool during the relevant period, or in the available labor pool in the year 1971, where corroborated by evidence of subjective selection processes which bring the "cold numbers convincingly to life", International Brotherhood of Teamsters v. United States, 431 U.S. at 339, supports an inference of employment discrimination violative of Title VII. See Eubanks v. Pickens-Bond Construction Co., 635 F. 2d at 1347; United States v. Hazelwood School District, 534 F. 2d 805, 813 (8th Cir. 1976), vacated and remanded on other grounds, 433 U.S. 299.

EEOC also offered evidence of specific instances of intentional discrimination against seven female applicants for entry-level positions at Rath. Prior to considering this evidence under the *McDonnell Douglas* standard, however, the Court will determine whether Rath successfully re-

butted plaintiff's prima facie case of disparate impact with proof that its hiring practices and policies "bear a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

B. *Business Necessity Basis for Rath's Selection Procedure*

As the Court has held that Rath's purportedly neutral hiring procedures select applicants in a discriminatory manner, the burden now shifts to the employer to show that such procedures are job-related. If the employer can establish that its challenged selection process is justified by business necessity and legitimate concerns for efficient production, it may continue to utilize this process. See Dothard v. Rawlinson, 433 U.S. at 329; Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, No. 79-1531 at 14 (8th Cir. filed Nov. 3, 1980). This circuit has developed a two-pronged business necessity test which requires (1) that the challenged practice accurately gauge the ability of prospective employees to accomplish the work, and (2) that there is no acceptable alternative that will effectuate an employer's production goals as well with a lesser differential sexual impact. See Green v. Missouri Pacific Railroad Co., 523 F. 2d at 1298.

The Court is not convinced that Rath has dispelled the inference of discriminatory impact established by EEOC. Trial testimony disclosed the need for considerable physical exertion on the job, yet at no point did defendant provide a substantive definition of the quantum or extent of physical strength essential to good workmanship in the context of a specific task. Mr. McFarland articulated

a threshold height and weight requirement, but subsequently averred that such requirements were not of particular importance and did not constitute a basis for his hiring decisions. Moreover, undisputed evidence indicates that males hired during years for which reliable statistics are available did not substantially comply with the height standard. As the Tenth Circuit emphasized when confronted with a similar factual pattern, failure to hire minority applicants because they do not meet all of the employer's prerequisites is not justifiable where non-minorities are hired despite their nonconformity to the identical requirements. United States v. Lee Way Motor Freight, Inc., 625 F. 2d 918, 931 (10th Cir. 1979).

Admittedly, over half of the plant's positions were in the Kill and Cut departments, and it was evident from the testimony that several of these positions were either less desirable to female employees or beyond the physical capabilities of some of them. The fact that the plant's bidding procedure, described in plaintiff's Exhibit 1, could in all probability culminate in a new hire being forced onto the least pleasant job in any department figured prominently in management hiring decisions.

It is nonetheless noteworthy that the size and strength necessary to execute certain tasks were nowhere specified, and under the evidence adduced tended to vary with the particular task. No tests were administered before hire to predict or measure a prospective employee's ability to effectively perform any of the plant's functions, with the exception of the maintenance classification. Nor were women prevented from securing a position due to its designation as a bona fide qualification exception (BFOQ) within the terms of the collective bargaining agreement.

Instead, testimony of management personnel demonstrated that women were able to perform a substantial majority of the jobs at the plant. As a result of individual preference, however, there were several, less onerous or unpleasant jobs favored by women employees. Male employees made a similar value judgment. The Court is persuaded that the employer's reliance upon the express preference of its few women employees for the proposition that all women were not equipped with the skills necessary to fill certain jobs on the Kill and Cut floors cannot be sanctioned, where premised upon an invalid presumption that no female worker could function efficiently in any of the more physically demanding jobs because of inherent gender-based limitations. See Dothard v. Rawlinson, 433 U.S. at 333. That decision belongs to the applicant in the absence of a BFOQ.

Nor does the fact that no female employee challenged the system by bidding on an "undesirable" job strengthen the employer's position, in the absence of proof that "all or substantially all women would be unable to perform the job involved." Weeks v. Southern Bell Telephone Co., 408 F. 2d 228, 235 (5th Cir. 1969), as quoted by the Supreme Court in Dothard v. Rawlinson, 433 U.S. at 333. Title VII rights are peculiar to the individual, and are not lost or forfeited because some members of the protected class are unable or unwilling to undertake certain jobs. Therefore, the facts of this case demonstrate that female applicants tended to suffer rejection at a higher rate than their male counterparts based on sex and sterotypic concepts concerning a woman's physical inability to perform particular kinds of work. See City of Los Angeles, Department of Water v. Manhart, 435 U.S. 702 (1978).

Insofar as the alleged requirement of prior job-related experience is concerned, Mr. Slight and Mr. Tobias testified that experience in a production-line facility was an important criterion in the selection process, yet apparently did not communicate this information to Mr. McFarland. Presumably, the significance of such an employment qualification would be conveyed to the member of the management team primarily responsible for screening and selection of applicants if it were deemed vital to good workmanship. Mr. McFarland pointed out that he did not consider previous experience when reviewing applications. Further, evidence indicating that a sizable number of male applicants lacking in prior factory-related work experience were hired substantially undermines defendant's argument. See United States v. Lee Way Motor Freight, Inc., 625 F. 2d at 931.

The evidence bearing on physical and experience prerequisites to employment is inconsistent and inconclusive, largely because any such criteria were unwritten and sporadically applied by management in conjunction with such imprecise standards as recommendations and work histories of friends employed at Rath, scholastic and delinquency records and general reputation in the community. Unlike the case of Holder v. Old Ben Coal Co., 618 F. 2d 1198 (7th Cir. 1980), cited to the Court by defendant for the proposition that "unskilled does not necessarily mean unqualified", no credible proof was offered that defendant looked for certain qualifications in evaluating applicants for unskilled positions, nor was there any suggestion in the record that Rath consistently sought the most qualified and experienced individuals to perform unskilled jobs.

In light of the inadequacy of defendant's evidence to show that particular gender-related qualifications provided a logical and legitimate explanation for a demonstrable disparity in hiring, the challenged selection procedures are not justified by business necessity, and as a consequence are proscribed by Title VII. Griggs v. Duke Power Co., 401 U.S. at 436; Donnell v. General Motors Corp., 576 F. 2d 1292, 1300 (8th Cir. 1978). Having arrived at the foregoing conclusion, the Court need not determine whether an alternative selection device which does not create the disparate impact can be proven.

C. *Individual Instances of Discriminatory Treatment*

EEOC also introduced evidence of actual discriminatory treatment of seven female applicants. Under these circumstances, the standard articulated in McDonnell Douglas v. Green, 411 U.S. at 802, must be applied in examining each instance of alleged discrimination.

Adopting the four-part test set forth in McDonnell Douglas, the Eighth Circuit in Meyer v. Missouri State Highway Commission, 567 F. 2d 804, 808 (8th Cir. 1977), cert. den., 435 U.S. 1013, held that to make out a prima facie case of sex discrimination in hiring, the complainant must demonstrate that: (1) she is a member of a protected class; (2) she was qualified for a job for which the employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained vacant and the employer continued to seek applications from persons possessing the complainant's qualifications. The proof necessary to establish an inference of discriminatory conduct may vary depending upon the particular facts and circumstances which characterize a particular case. McDonnell Douglas v. Green, 411 U.S. at 802 n. 13.

Once a prima facie case has been demonstrated, and an inference of intentional discrimination has thus been raised, the burden thereupon shifts to the employer to "articulate a legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-578 (1978). In advancing a rational basis for an employment decision, the employer need not demonstrate an absence of discriminatory animus. Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978) (per curiam).

The Court recognizes that in determining whether a prima facie case has been made out, it must consider the evidence adduced by both parties. Underwood v. Jefferson Memorial Hospital, 639 F. 2d 455, 457 (8th Cir. 1981). At trial, defendant established that applications were not solicited for any specific position by the Columbus Junction management prior to the plant's reopening in 1979; rather, Mr. McFarland would select an individual from an existing pool of applicants whenever a vacancy arose and was not otherwise filled through the regular bidding procedure. Obviously, rigid adherence to the *McDonnell Douglas* formula in this situation would erect a virtually insurmountable barrier to the government's ability to adduce evidence probative of the second component of this formula.

In a related factual context, where employees were told on several occasions that there were no vacancies, but where positions in their field were filled subsequent to their filing of applications, the Eighth Circuit ruled that the government had proven a prima facie case as to these individuals under the *McDonnell Douglas* rationale. United States v. Hazelwood School District, 534 F. 2d at 814-820. Thus, while there was no showing

therein that a specific position for which the employer actively sought applicants was available, the Court can conclude that in instances where male applicants were selected for employment within days of a woman's submission of an application during the years preceding the mass hiring undertaken in September of 1979, EEOC met its burden of demonstrating that a position was open and that the employer required applicants therefor. To hold otherwise would permit employers to evade the strictures of Title VII through the simple expediency of resorting to applications on file rather than advertising the availability of job openings whenever vacancies occur.

With the foregoing analysis in mind, the Court will evaluate each separate case of alleged disparate treatment. In view of the Court's decision on the no-spouse rule, any woman married to a Rath employee who applied for employment subsequent to the invocation of said policy and who cannot prove her disqualification was not due to its exclusionary effect will not be deemed to have established a prima facie case.

(1) Doris O'Connor, a non-spouse, applied for employment at Rath on November 16, 1976, and was informed at that time that Rath was not hiring. Previously, Ms. O'Connor had been employed at a beef packing plant in the capacity of machine operator. The male applicant hired on November 29, 1976 had factory experience but had never worked at a meat packing facility. Another male, hired November 30, 1976, had no previous employment experience. Ms. O'Connor again applied in September of 1979, during a period when Rath acknowledged that it sought applications, but was not among those selected for hire. In view of the Court's previous opinion as to the subjectivity of Rath's hiring criteria, the Court

will assume for the sake of discussion that Ms. O'Connor was as qualified as the two males chosen following her application in 1976, or those selected in September of 1979, in the absence of evidence to the contrary.

Rath made no showing that O'Connor was eliminated in the course of the selection process by virtue of her height, weight, prior factory experience or marital status. Since the employer did not rely on any particular selection criterion with any degree of consistency, the Court cannot deduce from the facts presented at trial that Ms. O'Connor's physical characteristics, the nature of her work history or her marital status rendered her ineligible for employment.

Nor can defendant refute the inference of intentional discrimination which has thus arisen with the unqualified allegation that its practice at all times was to select the most qualified applicant. Accordingly, the government succeeded in establishing a prima face case of discrimination against Ms. O'Connor, which was not rebutted by Rath.

(2) Nancy Conaway, a spouse, was nonetheless eligible for employment during the period extending from July 27, 1973, when she submitted her second application, and August 1, 1973, the date of the invocation of the no-spouse rule. Ms. Conaway had been employed for a short interval at Louis Rich, a turkey-processing plant, and at Victor Metal as a laborer for six years. Of the nine males hired during the period in question, only one male, who had also worked at Louis Rich, had prior meat packing experience.

Once again, based on Mr. McFarland's description of the pre-1979 selection process, the Court cannot conclude

that Ms. Conaway was not as qualified as the males hired subsequent to her application but in advance of Mr. Slight's promulgation of the no-spouse rule. Rath introduced no evidence to explain why Conaway was not considered for any of the nine entry-level positions, other than its generalized averment that all applications were reviewed and those best-qualified were selected. But as the Circuit has repeatedly emphasized, employment decisions based on subjective or ill-defined standards carry little weight in rebutting charges of discrimination. United States v. Hazelwood, 534 F. 2d at 813; Moore v. Board of Education of Chidester, 448 F. 2d 709, 713 (8th Cir. 1971).

The Court therefore believes that Ms. Conaway's rejection was not premised upon the "two most common legitimate reasons", lack of qualifications or absence of a job opening. International Brotherhood of Teamsters v. United States, 431 U.S. at 358 n. 44.

(3) Christine Hedrick, a spouse, testified that she first applied at Rath in the fall of 1971, in advance of the institution of the no-spouse rule and was refused employment. There was, however, no evidence that (1) a position for which Rath desired applications was vacant at that time, (2) defendant continued to seek applications from persons of similar qualifications, and (3) defendant did in fact hire male applicants thereafter. See International Brotherhood of Teamsters v. United States, 431 U.S. at 358; Chavez v. Tempe Union High School, 565 F. 2d 1087, 1091 (9th Cir. 1977); Opara v. Modern Mfg. Co., 434 F. Supp. 1040, 1043-1044 (D. Md. 1977). Therefore, despite this Court's construction of the *McDonnell Douglas* test, it is unable to conclude that a prima facie case was established as to Ms. Hedrick's rejection in 1971.

Ms. Hedrick reapplied on December 4, 1979, at which time she was no longer subject to the no-spouse rule due to her recent divorce from a Rath employee. Since that date, Hedrick checked on the status of her application two or three times a week, but was told that Rath was not hiring. On one occasion, office staff informed her that the son of one of Rath's foremen, Denny Wagner, had been hired on Mr. Tobias' instruction to fill a vacant position without being required to apply therefor.

Based on the foregoing sequence of events, the Court is not persuaded that a prima facie showing of intentional discrimination has been made. EEOC did not introduce proof of the temporal proximity of the occurrence of the vacancy filled by Wagner and Ms. Hedrick's application in December of 1979, Loeb v. Textron, Inc., 600 F. 2d 1003, 1013 (1st Cir. 1979), a critical element of the *McDonnell Douglas* analysis. And while the aforementioned test was intended to be neither "rigid, mechanized or ritualistic", Furno Construction Co. v. Waters, 438 U.S. at 477, nor to provide the exclusive method of proving a claim of discrimination, International Brotherhood of Teamsters v. United States, 431 U.S. at 358, it nonetheless offers the most efficient framework for organization and analysis of the evidence under the circumstances of this case. The agency has thus failed to raise an inference of sexual discrimination in hiring as to Ms. Hendrick.

(4) Mary Turner, a spouse, was nonetheless eligible for employment from the time of her first application in May of 1973 until the inception of the no-spouse rule on August 1 of that year. During the brief interim between July 18 and August 1, 1973, approximately sixteen males were chosen, one of whom had never been employed and eight whose records evinced no prior factory experience.

Ms. Turner, in contrast, possessed more than two years' worth of non-related factory experience. Subsequent applications submitted by Ms. Turner will not be considered, since plaintiff did not affirmatively demonstrate that she was rejected for any reason other than the anti-spousal strictures.

Even under an expansive interpretation of the four-prong *McDonnell Douglas* test, the Court is not willing to infer from the foregoing facts that Ms. Turner was rejected in May of 1973 in favor of similarly or less qualified applicants who were not selected until the latter part of July of that year. The temporal relationship between the two events is simply too tenuous for purposes of creating an inference of discriminatory intent. Therefore, plaintiff has failed to make out a prima facie case of discriminatory treatment as to Ms. Turner.

(5) Louise MacEachern, a spouse, was fully qualified for employment from the date of her initial application in 1966 until August 1, 1973. EEOC was able to show that approximately nine males were hired following her application of July 27, 1973 but in advance of the August 1st cut-off date. At the time of the application in question, Ms. MacEachern worked at Louis Rich and had also held other production-line jobs in prior years.

As was the case with Ms. Conaway, the Court will assume that Ms. MacEachern was as qualified as each of the nine men who were allegedly selected in her stead. In this regard, the Court must note that Ms. MacEachern was eminently suited for employment under any of the defendant's unwritten criteria, in view of the fact that she exceeded Rath's supposed height and weight requirements and could in addition point to some previous factory-related experience. In the absence of a defendant's artic-

ulation of a legitimate reason for her rejection, the Court finds that plaintiff has succeeded in proving that Ms. MacEachern was denied employment in 1973 on the basis of sex.

(6 and 7) Previously, the Court indicated that it was unable to rule that any female applicant rejected solely on the ground of the no-spouse rule had suffered intentional discrimination as a result of her rejection, in the absence of other evidence of defendant's sexual animus. Janice Stoneking and Linda Crumly were both married to Rath employees when they sought employment in 1979 and 1974, respectively. Neither woman was informed of the existence of the rule at that juncture, but both were apparently disqualified thereby.

However, additional evidence of discriminatory treatment designed to conform to the four-part analysis of *McDonnell Douglas* was not offered. Due therefore to the dearth of evidence of proscribed conduct in the record, the Court cannot hold that either woman was refused employment because of her sex rather than through the operation of the no-spouse rule. No conclusive inference of defendant's discriminatory animus having been established, the Court is of the opinion that plaintiff has not sustained its burden of proof with respect to Janice Stoneking and Linda Crumly.

NO SPOUSE RULE

It is plaintiff's ultimate contention that the employer's implementation of a facially neutral no-spouse rule operated to disproportionately exclude from employment members of a protected subclass, married women. See Dothard v. Rawlinson, 433 U.S. at 329. According to paragraph 7 of the parties' joint stipulation, twenty-six

women were rendered ineligible by the rule from the point of its inception on August 1, 1973 until February 15, 1978.[3]

As plaintiff acknowledges, it is impossible to calculate with any degree of precision the number of women adversely impacted by the no-spouse policy subsequent to February 15, 1978 because applications filed on or about the time the plant reopened in 1979 were destroyed pursuant to management directive. Therefore, the Court's statistical analysis will be limited in scope to the period extending from August 1, 1973 to February 15, 1978.

Discrimination against a portion of a protected subclass through the unequal impact of an ostensibly neutral employment policy is prohibited under Title VII. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). See also Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (7th Cir.), cert. den., 404 U.S. 991 (1971). Based on applicant flow data encompassing the period relevant to this discussion, which data the Court previously found to have shown that Rath's selection procedures discriminatorily impacted against women, the Court concludes that the antispousal rule selected applicants for hire in a substantially disproportionate pattern.

The applicant flow study demonstrated that Rath's subjective hiring practices resulted in a statistically significant disparate pattern. Defendant's discriminatory conduct in this manner contributed to a male-dominated work force. Inevitably, therefore, the skewed composition of Rath's labor pool precluded evenhanded enforcement of the no-spouse rule during the five-year period, as evidenced by the 26 to 0 ratio delineated in the stipulation.

Accordingly, the rule disqualified approximately 21% of all female applicants within the relevant time frame, while excluding no males.

The fact that the work force is predominantly male makes it apparent that several times as many wives as husbands would be subject to disqualification under the rule. There is no way of knowing how many wives might have applied for work at Rath but for the no-spouse rule, but the proportion of the sexes in the work force leads to the logical conclusion that the impact of the no-spouse rule fell more heavily upon wives than their husbands. These raw comparisons, where coupled with evidence of Rath's illegal selection process, are sufficient in the Court's estimation to establish a prima facie case of sexual discrimination under the disparate impact theory. See Dothard v. Rawlinson, 433 U.S. at 329-330; Yuhas v. Libbey-Owens-Ford Co., 562 F. 2d 496, 498 (7th Cir. 1977), cert. den., 435 U.S. 934 (1978).

Having found that EEOC made a prima facie case that the employer's no-spouse disproportionately excluded women from employment, the Court will proceed to consider whether the rule can be justified under a business necessity rationale. Dothard v. Rawlinson, 433 U.S. at 229; Griggs v. Duke Power Co., 401 U.S. at 432. If the employer can demonstrate that the challenged rule is predictive of job performance, and is necessary to safeguard its legitimate interest in effective and trustworthy workmanship, then continued enforcement of this rule does not violate the strictures of Title VII. See Kirby v. Colony Furniture Co., Inc., 613 F. 2d at 703. Should the employer sustain its burden of proving that its disputed employment practice is manifestly job-related, plaintiff may then show that "other employment practices, which lack a similarly discriminatory effect, would satisfy" the employer's production goals. *Id.*

From approximately 1966 to the present, seven married couples have been employed at the Columbus Junc-

tion facility. In August of 1973, the no-spouse rule was invoked by local management to resolve problems arising from spousal employment which were peculiar to this plant. Spouses already employed at the rule's inception were retained.

Upon review of the totality of the circumstances and the proof thereof, the Court is persuaded that the anti-spousal policy was enacted to achieve the interrelated business objectives of optimum production and employee performance. Rath has therefore rebutted the adverse inference created by plaintiff's prima facie showing of a sexually disparate impact.

There is ample support in the record for defendant's assertion of a business necessity justification for the no-spouse rule. At the time Mr. Slight invoked the rule, a number of opportunities for work conflicts could be attributed to spousal employment, which were in turn linked to a decrease in production. Among the reasons given for adoption of the rule were Mr. Slight's experiences with: (1) dual absenteeism, in the case of funerals, family sickness, and other family-related activities; (2) problems which arose where one spouse remained in the bargaining unit while the other was a member of management, which include suspicions of favoritism in hiring as well as tensions engendered, both in the subordinate spouse and fellow employees, where one spouse was called upon to supervise or discipline the other; (3) scheduling of vacations and leaves of absence; and (4) employee pressure to hire spouses.

Any of the foregoing difficulties, particularly those which culminated in the absence of both members of the marital unit, interfered with the smooth functioning of the employer's business. Joint absences resulted in

a disruption in the production line caused by the necessity of replacing two workers with less qualified and experienced personnel drawn from the miscellaneous crew.

Plaintiff relies upon statistical evidence, derived from absentee records covering the period of March 3, 1975 to May 31, 1978, to buttress the proposition that spouses exhibited a lower absentee rate than did non-spouses. Production records for this period demonstrate that daily production was not detrimentally affected by the minimal dual spouse absenteeism which occurred. Nevertheless, management's perception in 1973 of the disruptive effect upon plant operations and employee attitude precipitated by such absenteeism, and the preventive measures taken to ameliorate the situation, were rationally predicated upon sound business interests.

Through attrition, the number of married couples in Rath's work force has diminished, and those who remained during the interval surveyed by plaintiff were stable, reliable employees possessing good work records. It is therefore impossible for the Court to infer, from the characteristics evinced by members of this small spousal sample, that the problems initially encountered by management on or about the time of the rule's imposition would not recur in the event more spouses were hired.

In this regard, a single incident of habitual dual absenteeism related to a wife's inability to perform her assigned task without her husband's assistance was attested to at trial. When the husband became ill, the wife was invariably absent. While this occurrence of course does not furnish a legitimate basis for presuming that all wives will function on the job in a similarly ineffectual manner without their husbands' aid, the Court is of the opinion that the interruption in the production line oc-

casioned by the loss of both husband and wife in the context of this particular couple lends credence to defendant's desire to avoid a repetition of such complications through the establishment of a no-spouse rule.

With respect to the scheduling of vacations, the two most serious difficulties connected to spousal selection of vacation time were corrected when the company prohibited trading in 1970 and initiated a policy in 1973 requiring all employees to indicate in the order of seniority their preference on the day canvassing is undertaken. Plaintiff concedes that scheduling dilemmas were most frequently associated with management efforts to accommodate spousal employees, but contends that such dilemmas have essentially been resolved to the satisfaction of all employees. Accordingly, in plaintiff's view, this argument no longer provides a valid foundation for defendant's business necessity rationale.

Employee morale, an element crucial to this analysis, has not been incorporated into plaintiff's discussion. Evidence in the record indicates that spouses remain dissatisfied with the present canvassing procedure, and persist in attempting to manipulate that procedure to their own ends. The current system also permits disgruntled fellow workers to apply for the vacation term sought by the spouse with the least seniority, thereby precluding the couple from securing a joint vacation. Such subtle, yet tangible indicia of employee discontent and animosity, stemming entirely from the marital relationship, instills a negative influence in Rath's work environment.

It is thus apparent from the record that attitudinal problems figured prominently in the employer's decision to invoke the rule. Because Mr. Tobias was promoted to a management position which entailed supervision of

his wife, a considerable amount of employee ill-will, taking the form of a proliferative number of filed grievances, was generated. Mrs. Tobias endured the resentment and petty harassment of co-workers convinced of her receipt of special privileges by virtue of her marital status.

The Tobias incident, in conjunction with those previously discussed, are sufficient, in the Court's estimation, to justify Mr. Slight's conclusion that substantial disadvantages to employing spouses within the plant outweighed any resultant benefit.

The issue the Court must address herein is not whether the heretofore described difficulties stemming from spousal employment were so egregious as to warrant imposition of the anti-spouse policy, but whether management's response to perceived production problems attendant upon the interjection of the marital relationship into the work place was reasonable under the existing circumstances, and designed to improve conditions in the plant. While defendant was unable to statistically corroborate its contention that production was adversely affected through the hiring of spouses, the Court is nonetheless of the opinion that the reasons articulated by Rath for promulgation of the rule are substantiated by the evidence.

Reasons similar to those given by defendant are commonly relied upon in the marketplace as constituting, in the aggregate, a valid premise for management invocation of policies barring spouses from working in the same environment. See Yuhas v. Libbey-Owens-Ford Co., 562 F. 2d at 499. In this regard, Dr. Irving Kovarsky, defendant's expert witness, opined that based on his general experience in the area of industrial relations, antispousal doctrines are widely utilized and accepted, and are founded on legitimate business concerns.

Conversely, Dr. Francine Hall, testifying on plaintiff's behalf, stated that exclusion of spouses from the employer's labor pool does not lead to increased productivity, and does not accurately gauge employee ability. It was Dr. Hall's opinion that no-spouse rules are held in increasing disfavor within the industrial and manufacturing sector. Neither expert witness adapted his or her analysis to the particular facts and circumstances of Rath's Columbus Junction operation.

Having carefully weighed the conflicting expert testimony, the Court concludes that Rath's espousal of one of two ostensibly reasonable, albeit theoretical views regarding the employment of spouses does not detract from its business necessity argument. While a less restrictive version of the present rule might, in the abstract, constitute a more viable alternative, EEOC has not convincingly demonstrated that such an alternative would function more effectively in Rath's work environment to fulfill management's production goals as well with a lesser differential sexual impact. See Albemarle Paper Co. v. Moody, 422 U.S. 425; Kirby v. Colony Furniture Co., Inc., 613 F.2d at 703.

Due, therefore, to the lack of convincing evidence in the record pertaining to the feasibility of implementation of an alternative to the no-spouse rule that would further management's interest in efficient job performance, while exerting a lesser impact on the protected subclass, the Court is satisfied that defendant has presented an acceptable, business-related basis for the rule in question. See Harper v. Trans World Airlines, Inc., 525 F. 2d 409, 411 (8th Cir. 1975). As the *Yuhas* court aptly observed in assessing an industrial employer's business necessity defense:

> It would be hard to prove that any of these [the employer's] reasons for maintaining a no-spouse rule are valid in the sense that, without the rule, production would fall. Our devices for measuring industrial efficiency and morale are not so finely tuned that they can easily make such a determination. On the other hand, these reasons are far from frivolous. They correspond to the reasons which have led a number of institutions to conclude that family members should not work in the same environment. The movement to a sharp dichotomy between the workplace and the home may not in the long run prove to be a fruitful one, but it has become widely prevalent in our society.

Yuhas v. Libbey-Owens-Ford Co., 562 F. 2d at 499.

In conclusion, the Court finds that plaintiff has established a prima facie case of discriminatory hiring practices based on statistical evidence of a disparate impact suffered by the protected class and that defendant intentionally discriminated against Doris O'Connor, Nancy Conaway and Louise MacEachern. While plaintiff was able to demonstrate that Rath's no-spouse rule discriminatorily affected married female applicants, defendant sustained its burden of proving that the rule was justified by business necessity.

This opinion is dispositive of the liability issue only. Accordingly, the question of appropriate relief in this matter shall be resolved at a later hearing. The Court will require the parties to submit briefs concerning the matter of the remedy to be awarded plaintiff in light of the Court's assessment of liability, which should include a discussion of whether the non-party discriminatees, O'Connor, Conaway and MacEachen, are entitled to relief.

As indicated earlier, this action was pled, briefed and is being treated as a § 703(a) action for individual discrimination. As the action was founded upon the claim of Mary Turner, the persons whom the Court has found were subjected to individual discrimination may not be entitled to any relief. Although this could have been treated as a liability question, the Court felt it more efficient to make findings as to the treatment of these individuals and give the parties an opportunity to brief the issue as to whether these individuals are entitled to any relief.

IT IS THEREFORE ORDERED that plaintiff shall have partial summary judgment on the issue of liability, in accordance with this Order.

IT IS FURTHER ORDERED that the parties shall, within thirty (30) days from the date of this Order, submit briefs addressing the issue of appropriate relief in light of the Court's determination of liability. This discussion should encompass the question of whether the non-party discriminatees, O'Conner, Conaway and MacEachern, are entitled to relief. Each party shall have ten days thereafter to file reply briefs. If it is determined that the foregoing persons are not entitled to some relief, judgment for Rath would be proper. If it is determined that relief is proper the question of relief shall be set down for hearing in its regular course.

Signed this 22nd day of April, 1981.

/s/ W. C. Stuart
W. C. Stuart, Chief Judge
Southern District of Iowa

Appendix No. 1

Applicant Flow Data

Application of the standard deviation method to applicant flow data results in a showing of the statistical significance of the impact of Rath's hiring practices for the period encompassing January 1, 1973 to February 15, 1978. As provided in the stipulation, all 26 spousal applicants were female.

Total Applicants (Excluding 26 spouse applicants) = 531

Male Applicants = 436

Female Applicants (Excluding 26 spouse applicants) = 95

Males Hired = 157

Females Hired = 7

Total Hired = 164

(1) Expected number of female hires

$$\frac{95 \times 164}{531} = 29.34$$

(2) Observed number of female hires = 7

(3) Standard deviation = $\sqrt{npg}$

$$\sqrt{95 \times \frac{164}{531} \times \frac{367}{531}} = \sqrt{20.2789} = 4.503$$

n = total sample

p = probability of selecting females

g = probability of selecting males

(4) $$\frac{\text{Expected value (29.34) - observed value (7)}}{\text{Standard deviation (4.503)}}$$

4.96 standard deviations

According to the Supreme Court, a difference of 2 or 3 standard deviations in a large sample would appear statistically significant. Castaneda v. Partida, 430 U.S. at 496-497 n. 17. See Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396, slip op. at 12 n. 8. Thus where the difference between the expected and observed values for females hired at Rath is 4.96 standard deviations in a fairly large sample, the disproportionate impact of the defendant's selection procedures is statistically significant and gives rise to a prima facie case.

Appendix No. 2

The available applicant pool, as derived from census data for Louisa County, the relevant labor market, is comprised of the following job classifications: (1) the nondurable good manufacturing subclass of the class of nontransport operatives, and (2) nonfarm laborers. See plaintiff's Exhibit 25. The foregoing occupations will be accepted as substantially similar to the positions at issue herein, in the absence of rebuttal of plaintiff's evidence in this regard.

During the census year 1970, there were 454 total employees in each of the two pertinent categories in Louisa County, of which 98 were women, thus giving rise to a figure of 21.58% female employees in the Louisa County labor market. See plaintiff's Exhibit 25.

Application of the standard deviation method eliminates the probability that the low proportion of females in Rath's labor pool for the year 1971 was due to chance.

(1) Expected Value (% females employed in Louisa County in relevant occupational groups in 1970)

= 21.58% Total Sample - 229 #Rath employees for 1971

= 229 x .2158

= 49.42

(2) Observed Value (% females employed by Rath in 1971)

= 5.69%

= 229 x .0569

= 13.03

(3) Standard deviation = $\sqrt{npg}$

= $\sqrt{229 \times .2158 \times .7842}$ n = total sample

= $\sqrt{38.75}$ p = probability of selecting females

= 6.225 g = probability of selecting males

(4) $\frac{\text{Expected value (49.42) - Observed value (13.03)}}{\text{Standard deviation (6.225)}}$

5.845 standard deviations

As stated in Appendix 1, a difference of 2 or 3 standard deviations would appear statistically significant. Castaneda v. Partida, 430 U.S. at 496, 497 n. 17. A standard deviation of 5.845 for the year 1971 corroborates plaintiff's contention that Rath's selection criteria have exerted a statistically significant impact upon members of the protected class, thus making out a prima facie violation of Title VII.

Appendix No. 3

Examination of plaintiff's Exhibit 27, which contains Rath's responses to EEOC's second request for admissions, in connection with plaintiff's Exhibit 1, the stipulation of undisputed facts, discloses that ten of the twenty-six female spouses submitted applications prior to the rule's initiation date, August 1, 1973. Paragraph 7 of the stipulation points out that all twenty-six women were disqualified through the operation of the no-spouse rule, regardless of whether their applications preceded its promulgation.

Louise MacEachern and Nancy Conaway, who are members of the spousal group in question, were deemed by the Court to have been discriminatorily refused employment in advance of the institution of the rule. Thus the fact that the antispousal policy later provided defendant with a legitimate basis for disregarding the two women's applications has no effect upon the Court's determination that sex was the sole or dominant factor in Rath's decision to reject them in July of 1973.

(3)

No. 86-67

Supreme Court, U.S.
FILED
SEP 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE RATH PACKING COMPANY CREDITORS' TRUST,
SUCCESSOR IN INTEREST TO THE RATH PACKING COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHNNY J. BUTLER
General Counsel (Acting)
Equal Employment Opportunity Commission

14 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that petitioner's subjective hiring practices violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, because of their adverse impact on females?

2. Whether the court of appeals erred in holding that petitioner's policy against hiring spouses of existing employees was not justified by business necessity?

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-67

THE RATH PACKING COMPANY CREDITORS' TRUST, SUCCESSOR IN INTEREST TO THE RATH PACKING COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 787 F.2d 318. The opinion of the district court (Pet. App. 1d-36d) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1986. On June 17, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 17, 1986. The petition for a writ of certiorari was filed on July 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From at least 1971 to June 1978, petitioner operated a hog slaughtering and processing facility in Columbus Junction, Iowa. Petitioner employed approximately 250 persons in the Columbus Junction facility, about 95% of whom employees were male. In September 1977, the Equal Employment Opportunity Commission filed this action, alleging that the composition of petitioner's workforce was attributable to employment practices violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Specifically, the Commission alleged that petitioner's subjective hiring practices and policy against hiring spouses of existing employees unlawfully discriminated against females because of their sex. Pet. App. 3d.

2. The district court agreed with the Commission that petitioner's subjective hiring practices violated Title VII (Pet. App. 4d-23d). The court noted that petitioner had not used any objective criteria in selecting employees (*id.* at 4d-6d), that hiring decisions at the Columbus Junction facility had been the responsibility of one company official (*id.* at 4d-5d), that that official was "unable to identify what information he deem[ed] significant in evaluating applications * * * or to * * * indicate what factors prompt[ed] him to select some individuals * * * and to reject others" (*ibid*), and, most importantly, that statistically significant disparities—disparities sufficient to establish a prima facie case of adverse impact—existed between the percentage of females employed in the Columbus Junction facility and the percentages of actual and potential female applicants during the 1971-1978 period (*id.* at 6d-11d).[1] The court then

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[1]The court found that between 1973 and 1978 petitioner hired only seven females and that, based on applicant flow data, petitioner reasonably could have been expected to hire 29.34 females—a disparity of 4.96 standard deviations (Pet. App. 7d-8d, 33d-34d). The court also found that, in 1971, females comprised 5.69% of the Columbus Junction plant

found that the subjective hiring practices' adverse impact could not be defended as "job-related," noting that there was "no credible proof * * * that [petitioner] looked for certain qualifications in evaluating applicants * * *, nor was there any suggestion in the record that [petitioner] consistently sought the most qualified and experienced individuals * * *" (*id.* at 15d). Finally, the court determined that the Commission had successfully proven several specific instances of intentional discrimination (*id.* at 16d-23d). Accordingly, the court held that petitioner's subjective hiring practices were violative of Title VII (*id.* at 31d-32d).

However, the district court found that petitioner's "no-spouse" rule—*i.e.*, its policy against hiring spouses of existing employees—did not violate Title VII (Pet. App. 23d-31d). The court agreed with the Commission that the no-spouse rule had a disparate adverse impact on female applicants (*id.* at 23d-26d) and that petitioner had not "corroborate[d] its contention that production was adversely affected through the hiring of spouses * * *" (*id.* at 29d). But the court found that petitioner had promulgated the no-spouse rule to promote legitimate business concerns[2] and that such concerns were "reasonabl[y], albeit theoretica[lly]," addressed by the no-spouse rule (*id.* at 29d-31d).

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labor force and 21.58% of the relevant labor pool—a disparity of 5.845 standard deviations (*id.* at 7d-9d, 34d-35d). This Court has held that a disparity of 2 or 3 standard deviations can be legally significant. *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n.17 (1977).

[2]Petitioner suggested that four problems related to spousal employment—dual absenteeism, tensions engendered by spousal supervision, scheduling of vacations and leaves of absence, and employee pressure to hire spouses—led it to adopt the no-spouse rule. See Pet. App. 26d. The district court found that these problems either were corrected prior to the implemention of the no-spouse rule or were based on singular incidents. (*id.* at 26d-28d). Nevertheless, it agreed with petitioner that, as a general matter, spousal employment creates problems in employee morale. (*id.* at 29d).

Accordingly, the court held that petitioner had established that the no-spouse rule was justified by business necessity (and therefore did not violate Title VII) (*id.* at 30d-31d).[3]

3. On appeal by petitioner and on cross-appeal by the Commission, the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part (Pet. App. 1a-44a). As to the subjective hiring practices, the court of appeals agreed with the district court that petitioner had not shown that these practices were "job-related": Petitioner had been "unable to identify the criteria and qualifications which were considered in the hiring decisions * * * [and] therefore [could] not establish that these qualifications were necessary to the safety and efficiency of its operations" (*id.* at 17a). However, as to the no-spouse rule, the Commission argued and the court of appeals agreed that the district court had imposed a lighter burden on petitioner than required by law and that the district court's finding of business necessity was contrary to the record evidence and inconsistent with its own subsidiary findings (*id.* at 24a). The court of appeals' disagreement with the district court went to that court's failure to "consider whether there was a compelling need for the no-spouse rule" (*id.* at 25a). The court of appeals noted that "the proper standard * * * is not whether [a business practice with a discriminatory result] is justified by routine business considerations * * *" (*ibid.*, quoting *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980), as the district court had reasoned (see Pet. App. 29d), but whether the practice has " 'a manifest relation to the employment in question' " (Pet. App. 25a, quoting *Dothard* v. *Rawlinson*, 433 U.S. 321,

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[3]The district court referred the case to a special master for relief proceedings. The master held an evidentiary hearing and recommended, *inter alia*, that the court award $1,015,901 in back pay and certain affirmative relief (Pet. App. 1c-40c). The district court largely adopted the master's findings (*id.* at 1b-11b).

329 (1977)). Moreover, in applying this legal standard to the district court's factual findings, the court of appeals found that petitioner had failed to show that the no-spouse rule contributed to the safety and efficiency of its operations (Pet. App. 25a-29a). Accordingly, the court of appeals concluded that petitioner had "failed to demonstrate that the no-spouse rule was justified by business necessity" (*id.* at 28a-29a).

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that it violated Title VII by employing subjective hiring procedures with an adverse impact on female applicants and by maintaining a policy of not hiring spouses of existing employees. However, the court of appeals correctly decided all issues presented to it and, for that reason, the case presents no issue warranting review by this Court.

1. Petitioner first contends that this Court should grant a writ of certiorari to resolve a conflict in the federal circuits concerning whether a Title VII plaintiff may challenge subjective employment practices for their alleged disparate impact. See Pet. 7-16. As noted in the petition for certiorari filed today in *Tisch* v. *Shidaker*, No. 86- , the courts of appeals are in fact hopelessly divided over the applicability of disparate impact theory to subjective selection devices. However, this case does not raise that issue in a way justifying a grant of certiorari.

The petition for certiorari in this case raises for the first time in this litigation the question whether a Title VII plaintiff can challenge subjective employment practices for their alleged disparate impact. Nothing in the district court's opinion suggests, and petitioner does not now allege, that the applicability of disparate impact analysis to subjective decisionmaking processes was ever challenged in the district court. More importantly, in the court of

appeals, petitioner contended only that its subjective hiring practices were justified by business necessity; it did not argue that the district court had erred in finding that a prima facie case of disparate impact had been established. See Pet. App. 15a-18a; Appellant's Brief For The Rath Packing Company, Nos. 84-1217-SI, 84-1458-SI, at 22-25 (8th Cir. filed May 30, 1984); Reply Brief And Cross Appellee's Brief For The Rath Packing Company, Nos. 84-1217-SI, 84-1458-SI, at 18-19 (8th Cir. filed Aug. 1, 1984). Accordingly, neither the district court nor the court of appeals had an opportunity to address the argument that petitioner now raises; judicial prudence counsels against allowing petitioner to raise that issue for the first time in this Court. See *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983) (discussing various prudential reasons for not considering issues presented for the first time in this Court); *Youakim* v. *Miller*, 425 U.S. 544, 551-552 n. 5 (1976) (same); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (same); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (same).

In any event, even if petitioner had raised that issue in the courts below, certiorari would still not be justified because the Commission's evidence proved discrimination under both disparate impact and disparate treatment theories. The district court noted that both "the discriminatory treatment and impact theories * * * may be applied to the specific facts of this cause" (Pet. App. 6d) and held that there had been several instances of intentional discrimination (*id.* at 31d). While the court's analysis of the Commission's statistics led it to find disparate impact and to reach no further express holding concerning disparate treatment, the court did expressly determine that the Commission's statistics satisfied the thresholds of sufficiency that this Court has established for disparate treatment cases (see *id.* at 6d-12d) (citing *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *Teamsters* v. *United States*,

431 U.S. 324 (1977)). For these reasons, the court of appeals quite reasonably concluded that "intentional discrimination against women resulted in [petitioner's] employees being overwhelmingly male" (Pet. App. 29a).[4] In short, this litigation did not turn on the particular theory of employment discrimination under which the courts below analyzed the statistical data.[5]

By contrast, in *Tisch* v. *Shidaker*, No. 86- , the Court of Appeals for the Seventh Circuit found that a prima facie case of discrimination had been made out under the disparate impact theory, while upholding the district court's finding for defendant under the disparate treatment theory. Thus, in contrast to this case, the *Shidaker* litigation turns on the particular theory of employment discrimination applied by the courts. Accordingly, it is the more suitable vehicle for resolving the question that currently divides the courts of appeals. Because the petition for certiorari in this case raises that question for the first time on facts where its resolution is unlikely to make a difference in the outcome of the litigation, it should be denied.[6]

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[4]Petitioner argues that, in finding petitioner to have intentionally discriminated against women, the court of appeals was referring only to three instances of individual disparate treatment. See Pet. 18 n.6. But the court of appeals concluded that the "intentional discrimination resulted in [petitioner's] employees being overwhelmingly male" (Pet. App. 28a-29a). This conclusion obviously did not refer only to discrimination against three applicants to a work force of 250 employees.

[5]We recognize that the burden of proving intentional discrimination under a disparate treatment case is conceptually quite different from the burden of proving disparate impact, and may possibly require a different quantum of statistical proof. We note here only that the district court's own reasoning indicated strongly that both burdens were carried.

[6]Alternatively, the Court may wish to hold this case pending the certiorari decision, briefing, and resolution of *Shidaker*.

2. Petitioner also contends that this Court should grant certiorari to resolve whether the court of appeals erred in holding that petitioner failed to establish that its policy against hiring spouses of existing employees was not justified by business necessity (Pet. 19-23). Petitioner suggests that the court of appeals applied an unduly restrictive standard of business necessity and that that standard "conflicts with the more reasonable standard applied by the Seventh Circuit" in *Yuhas* v. *Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978). But petitioner's criticisms are misdirected in this case and, accordingly, this Court's review is unwarranted.

Although certain language in the court of appeals' decision refers to a "compelling need" standard (Pet. App. 25a), the court summarized its holding in terms fully consistent with the reasoning of this Court and the other courts of appeals: "[Petitioner] failed to show that the problems * * * experienced in employing spouses had any demonstrable effect on safety and efficiency" (*id.* at 28a). See *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-332 & n.14 (1977); *Liberles* v. *Cook County*, 709 F.2d 1122, 1132 (7th Cir. 1983); *Jackson* v. *Seaboard Coast Line R.R.*, 678 F.2d 992, 1016 (11th Cir. 1982); *Zuniga* v. *Kleberg County Hospital*, 692 F.2d 986, 989 (5th Cir. 1982); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1275-1280 (9th Cir. 1981); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973); *Robinson* v. *Lorrillard Corp.*, 444 F.2d 791, 798 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). As in *Dothard*, petitioner "failed to offer evidence of any kind in specific justification of * * * [its] standar[d]" (*Dothard* v. *Rawlinson*, 433 U.S. at 331). Thus, petitioner's argument that the court of appeals applied an unduly stringent business necessity standard is without foundation.

Similarly, petitioner's suggestion that the court of appeals' business necessity standard conflicts with the decision in *Yuhas* is erroneous. To be sure, the *Yuhas* court did not require the employer there specifically to show that its "no-spouse" employment rule had positively improved employee morale. See 562 F.2d at 498-500. But the *Yuhas* court expressly noted that its decision would have differed if the plaintiffs there had "shown that [the employer] historically employed more men than women in its * * * plan[t] because it intentionally discriminated against women" (*id.* at 500); in such circumstances, the *Yuhas* court would have been unwilling to presume that a no-spouse rule positively affected the working environment (*ibid.*). In this case, the court of appeals found that petitioner's past "intentional discrimination against women resulted in [its] employees being overwhelmingly male" (Pet. App. 28a). Thus, the court correctly found the *Yuhas* case to be distinguishable (*id.* at 28a-29a). Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

DOJ-1986-09